No. 98-387-CFX

Title: Greater New Orleans Broadcasting Association, Inc., etc., et al., Petitioners
v.
United States, et al.

Docketed:
September 2, 1998

Court: United States Court of Appeals for the Fifth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Sep 2 1998 | Petition for writ of certiorari filed. (Response due November 2, 1998) |
| | Sep 24 1998 | Order extending time to file response to petition until November 2, 1998. |
| | Nov 2 1998 | Brief of respondents United States, et al. in opposition filed. |
| | Nov 12 1998 | Reply brief of petitioners Greater New Orleans Broadcasting Assn., Inc., et al. filed. |
| | Dec 9 1998 | DISTRIBUTED. January 8, 1999 |
| | Jan 11 1999 | REDISTRIBUTED. January 15, 1999 |
| | Jan 15 1999 | Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 25, 1999. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 24, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1999. Rule 29.2 does not apply.<br>SET FOR ARGUMENT April 27, 1999.<br>********** |
| | Jan 22 1999 | LODGING from Solicitor General consisting of 20 copies of appendix submitted to CA3 in Players Intl., Inc. v. United States, CA Nos. 98-5127 & 98-5242 |
| | Feb 11 1999 | Record filed. |
| | Feb 12 1999 | Record filed. |
| | Feb 24 1999 | Motion of petitioners to dispense with printing the joint appendix filed. |
| | Feb 24 1999 | Brief amici curiae of Valley Broadcasting Company and Sierra Broadcasting Company filed. |
| | Feb 24 1999 | Brief amicus curiae of American Gaming Association filed. |
| | Feb 24 1999 | LODGING consisting of four expanding files containing 26 exhibits each, submitted by counsel for the American Gaimg Assn. |
| | Feb 24 1999 | Brief amici curiae of National Assn. of Broadcasters, et al. filed. |
| | Feb 25 1999 | Brief of petitioner Greater New Orleans Broadcasting Association, et al. filed. |
| | Feb 25 1999 | Brief amicus curiae of Association of National Advertisers, Inc. filed. |
| | Feb 25 1999 | Brief amicus curiae of Washington Legal Foundation filed. |
| | Feb 25 1999 | Brief amicus curiae of American Advertising Federation filed. |
| | Feb 25 1999 | Brief amicus curiae of Institute for Justice filed. |
| | Mar 8 1999 | Motion of petitioners to dispense with printing the |

2 pp

No. 98-387-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | joint appendix GRANTED. |
| | Mar 12 1999 | CIRCULATED. |
| | Mar 17 1999 | Motion of petitioner for leave to withdraw as counsel for petitioners filed. |
| | Mar 24 1999 | Brief of respondents United States, et al. filed. |
| | Apr 12 1999 | Reply brief of petitioner Greater New Orleans Broadcasters Association, et al. filed. |
| | Apr 27 1999 | ARGUED. |

No. 98-

**In the Supreme Court of the United States**

OCTOBER TERM, 1997

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GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In this case, the Court of Appeals for the Fifth Circuit rejected the post-*44 Liquormart* rationale of the Court of Appeals for the Ninth Circuit, which struck down a federal ban on the broadcast of advertising concerning lawful casino gaming. Here, the appeals court upheld the same ban. The question presented is:

Whether the federal government may, consistent with the First Amendment, undertake to suppress lawful casino gaming by banning truthful, non-misleading broadcast advertising for such gaming.

## RULE 29.6 STATEMENT

The parties to the proceeding in the court below are named in the caption. None of the corporate parties have a parent company or a non-wholly owned subsidiary.

Greater New Orleans Broadcasters Association ("GNOBA"), a non-profit corporation, has filed this document on behalf of its members, which are listed below. None of the corporate members of the GNOBA has a parent company or a non-wholly owned subsidiary.

KMEZ-FM WWL-AM
WLMG-FM\WSMB-AM
1450 Poydras Street
Suite 440
New Orleans, LA 70112

WBOK-AM 1230
Christian Broadcasting Corp.
1639 Gentilly Boulevard
New Orleans, LA 70119

WCKW-FM 92.3
WCKW-AM 1010
222 Corporation
3501 N Causeway Blvd.
Suite 700
Metairie, LA 70002

WDSU-TV Channel 6
Pulitzer Broadcasting Co.
846 Howard Avenue
New Orleans, LA 70113

WBYU-AM
KMEZ-FM
WRNO-FM 99.5 FM
Centennial Broadcasting
201 St. Charles Ave.
Suite 201
New Orleans, LA 70130

WGNO-TV Channel 26
Tribune Broadcasting
#2 Canal Street
New Orleans, LA 70130



WLTS-FM 105.3
WTKL-FM 95.7
Phase II Communications
3525 N. Causeway Blvd
Suite 1053
Metairie, LA 70002

WNOE-FM 101.1
KKND-FM 106.7
KUMX
929 Howard Ave., 2nd Floor
New Orleans, LA 70113

WNOL-TV Channel 38
Quest Broadcasting, Inc.
1661 Canal Street
New Orleans, LA 70112

WVUE-TV Channel 8
Emmis Broadcasting
1025 South Jeff Davis Pkwy.
New Orleans, LA 70125

WWL-TV Channel 4
A. H. Belo Corporation
1024 North Rampart
New Orleans, LA 70116

WQUE-FM 93.3
WODT-AM 1280
WYLD-AM/FM
ClearChannel Communications, Inc.
2228 Gravier Street
New Orleans, LA 70119

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## PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 23a) is reported at 69 F.3d 1296 (5th Cir. 1995). This Court vacated that opinion on October 7, 1996 and remanded the matter for further consideration in light of *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996). *Greater New Orleans Broadcasting Association v. United States*, 117 S. Ct. 39 (1996). The opinion of the court of appeals on remand (Pet. App. 1a) is reported at 1998 WL 429422 (5th Cir.). The opinion of the district court (Pet. App. 42a) is reported at 866 F. Supp. 975 (E.D. La. 1994).

### JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Federal criminal statute 18 U.S.C. § 1304 (Pet. App. 59a) and Federal Communications Commission ("FCC") regulation, 47 C.F.R. § 73.1211 (Pet. App. 61a), authorize criminal prosecution and administrative sanctions for the broadcast of "any advertisement of or

information concerning any lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance . . . ."

## STATEMENT OF THE CASE

### *1. Preliminary statement.*

In its recent decision on remand from this Court, the Court of Appeals for the Fifth Circuit upheld the federal government's ban on broadcast advertising for casino gaming. The circuit court's decision directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Valley Broadcasting Co. v. United States*, 107 F. 3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998). That court held that the same advertising ban violated the First Amendment, as did the United States District Court for the District of New Jersey in *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997). The decisions of these lower courts are irreconcilable and go to the foundation of the First Amendment's guarantee of free speech. Resolution of such conflicting lower court opinions is a principal purpose for which the Court exercises its certiorari jurisdiction. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991); *see also*, Sup. Ct. Rule 10(a). Review of the circuit court's decision is vital in order to resolve this important conflict between the circuits pursuant to which the FCC currently bans speech in the southern states while permitting the same speech in other parts of the country.



Review of the circuit court's decision is also essential in order to provide the circuit court and other lower courts with further guidance regarding commercial speech doctrine. In the circuit court's opinion on remand, the panel majority criticized this Court for establishing in *44 Liquormart* what the panel majority called a standard for review of governmental bans on commercial speech "as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned." Pet. App. 3a. Because the panel majority failed to adhere to the Court's guidance in *44 Liquormart*, it also failed to follow the Court's order that it reconsider the government's ban on truthful gaming advertising "in light of *44 Liquormart*...." *Greater New Orleans*, 117 S. Ct. at 39. Instead, the panel majority clung tightly to selected dicta from certain of the Court's prior cases, ignoring the effect of more recent cases, particularly *44 Liquormart* and *Rubin v. Coors Brewing Co.*, 514 U.S. 484, 115 S. Ct. 1585 (1995), on those decisions. The Court should grant this petition in order to further clarify for the appeals court and other lower courts its standard for review of commercial speech bans.

Finally, petitioners believe the Court should take this opportunity to make it clear to lower courts that strict scrutiny should be applied to paternalistic commercial speech restrictions, such as the advertising ban at issue here, that the government imposes to keep consumers ignorant so that it can suppress participation in lawful commercial activities it believes to be undesirable.

***2. The Government's advertising ban.***

The Greater New Orleans Broadcasters Association ("GNOBA") is a non-profit trade association representing television and radio stations in the New Orleans, Louisiana area in matters affecting the broadcast industry. The remaining petitioners are several GNOBA members (the petitioners are hereinafter collectively referred to as "Broadcasters").

Federal law prohibits Broadcasters from airing advertising for lawful casino gaming. The regulatory scheme enforced against Broadcasters is federal criminal statute 18 U.S.C. § 1304 (Pet. App. 59a) and its corresponding Federal Communications Commission ("FCC" or "Commission") regulation, 47 C.F.R. § 73.1211 (Pet. App. 61a), which Congress enacted as section 316 of the Communications Act of 1934 (the respondents, FCC and United States of America, are hereinafter collectively referred to as the "Government"). The Government may impose monetary forfeitures, broadcast license revocation, criminal fines and imprisonment of up to one year against radio and television broadcasters that violate its ban.

In its present form, the ban is but a wisp of what Congress originally signed into law -- a blanket prohibition on broadcast lottery advertising. What remains of that prohibition is a vague regulatory scheme propped up by obscure, often unpublished rulings and undermined by a hodgepodge of Congressionally-approved exceptions. Those exceptions gut any



remaining vestiges of the ban's purpose and constitutional validity by permitting, and indeed encouraging, what the original regulatory scheme explicitly forbade, namely the broadcast of gaming advertising.

Passage of these exceptions has paralleled a nationwide explosion of all forms of gaming. In 1975, Congress exempted advertising of state-conducted lotteries by stations licensed in states permitting such lotteries. 18 U.S.C. § 1307(a)(1) (Pet. App. 59). Congress passed this exception so that state-conducted lotteries would flourish, and indeed they have; today, thirty-seven states and the District of Columbia sponsor lotteries. In 1988, the Government decided to permit Indian tribes to operate casinos and to encourage broadcast advertising for gaming at those casinos pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*; 47 C.F.R. § 73.1211(c)(3) (Pet. App. 62a). Today, casino gaming is conducted by Indian tribes in more than thirty-three states.

Congress has carved out another exception permitting broadcast advertising of gaming sponsored by non-profit or governmental entities for charitable purposes. 18 U.S.C. 1307(a)(2)(A) (1988) (Pet. App. 60a); 47 C.F.R. § 73.1211(c)(4) (Pet. App. 62a). Fishing contests, sporting events or contests, and occasional and ancillary lotteries conducted by commercial organizations other than casinos all constitute full-blown lotteries under the Government's interpretation of its ban, but broadcasting advertising for

those forms of gaming is also permitted . 18 U.S.C. § 1305 (1950); 1307(d) (1988); 1307(a)(2)(B) (1988) (Pet. App. 59a-60a); 47 C.F.R. § 73.1211 (Pet. App. 62a). Gaming in all of its forms, along with Government-sanctioned broadcasts promoting it, are now part of mainstream America. Some form of legalized gaming is allowed today in forty-seven states. Private, non-Indian casino gaming is legal in twenty-two states.[1]

### *3. Decisions of the lower courts.*

On February 25, 1994 in the District Court for the Eastern District of Louisiana, Broadcasters challenged the constitutionality of § 1304 and § 73.1211, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1331. In opposing the action, the Government presented no evidence justifying the scope or demonstrating the

[1] The ban is no longer enforced nationwide. Broadcasters in the nine most western states, Guam and the Northern Marianna Islands have been free from the ban since September 17, 1997, when the FCC ceased enforcement in response to the decision of the appeals court in *Valley Broadcasting*. FCC Public Notice, 12 FCC Rcd. 13925 (released September 17, 1997). Even before that decision, the FCC granted a blanket waiver from the ban to all broadcasters in Nevada. More recently, the FCC stopped enforcing the ban in New Jersey in response to the district court ruling in *Players International*. FCC Public Notice, 12 FCC Rcd. 22093 (released December 23, 1997). Radio and television stations now exempt from the ban reach roughly twenty-three percent of Americans.



effectiveness of its ban. Nevertheless, responding to the parties' cross-motions for summary judgment, the district court entered a summary judgment in favor of the Government on November 30, 1994. Pet. App. 42a. Broadcasters timely appealed to the Fifth Circuit Court of Appeals, and by a two-to-one vote an appeals court panel affirmed the district court's judgment. Pet. App. 23a. Broadcasters sought review by this Court, which, on October 7, 1996, vacated the decision of the appeals court and remanded the case for reconsideration in light of *44 Liquormart*, which the Court had decided after the circuit court's original decision. On July 30, 1998, the same panel once again affirmed the judgment of the district court by a vote of two-to-one. This latest decision on remand is the subject of this petition.

When it first reviewed the Government's ban, the majority of the circuit court panel recited the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980), but did not require that the Government justify the ban with evidence.[2] In its first petition for certiorari to this

[2] Central Hudson provides that:

> For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest

Court, Broadcasters criticized the panel majority's failure to require proof of the ban's effectiveness. While that petition was pending, the Court decided *44 Liquormart*, which substantially clarified, if not enhanced, the Government's burden of proof.[3] The Court promptly granted Broadcasters' writ and instructed the circuit court to revisit the matter.

On remand, the circuit court instructed the parties to file supplemental briefs concerning the effect of *44 Liquormart* on the legitimacy of the Government's advertising ban. In its brief, the Government, sensing that it could no longer rely on its prior assertion that it did not need to furnish evidence to support the ban, cited a barrage of non-legal sources for a brand new contention -- that the ban effectively suppressed compulsive gambling. In its opinion on remand, the panel majority correctly found that the Government's new "evidence" raised "numerous fact issues at a belated stage of this litigation." Pet. App. 12a-14a. The

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asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S. Ct. at 2351. The parties have never disputed that the advertising at issue concerns a lawful activity and is truthful and non-misleading.

[3] In *44 Liquormart*, the Court considered a challenge by a liquor store to a Rhode Island statute that forbade advertisements for liquor that featured price information. The state defended the statute as a means of promoting temperance. All nine Justices agreed that the ban violated the First Amendment.



majority also found that "the government's new argument suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos." Pet. App. 14a. But in spite of these findings, the panel majority then proceeded to do exactly what the Government attempted -- on its own notice it cited more unsubstantiated hearsay from newspaper columnists, politicians and other non-legal sources, absolutely none of which even referred to, much less proved anything about, the advertising ban *sub judice*. Pet. App. 11a, n. 9; 12a-14a, n. 10; 14a, n. 11; 15a, n. 12.

In addition, the panel majority repeatedly voiced its dissatisfaction with *44 Liquormart*, claiming that fragmentation of the Court in the case left the lower courts without direction. Instead, the panel majority relied on the Court's earlier decisions in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 487 U.S. 328, 106 S. Ct. 2968 (1986), and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696 (1993), to uphold the Government's ban.

As he did in his original opinion in this case, Chief Judge Politz dissented. Although he believed that *44 Liquormart* failed to provide "a coherent, dispositive framework" for evaluating the Government's ban, he recognized that, at a minimum, *44 Liquormart* made it even more apparent that the ban was unconstitutional, stating:

> Read together, the opinions in *44 Liquormart* teach that the government must use direct methods of controlling disfavored behavior. This, combined with the heavy burden of proof that is now placed on the government, substantially undercuts the validity of laws, such as the statute at issue here, which restrict nondeceptive commercial information.

Pet. App. 21a.

## REASONS FOR GRANTING THE PETITION

### I. The circuit court's decision creates a direct and irreconcilable conflict between the lower courts centering on the foundation of First Amendment doctrine.

There is only one First Amendment. It is based on principles, not on geography, and it applies to everyone. Chief among the principles that underlie the First Amendment is a conviction that the government of a free people cannot suppress ideas or information solely on the basis of a paternalistic belief that they concern matters the government deems undesirable. The lower courts addressed this fundamental tenet in a manner that simply cannot be harmonized. The Ninth Circuit court defended it, while the Fifth Circuit court abandoned it and in so doing sacrificed the rights of Broadcasters and all other citizens within its jurisdiction. Those citizens now have a materially diminished right to speak vis à vis



the citizens of ten other states. Only this Court can correct the aberration that the Fifth Circuit court's decision has created. Unless reversed by this Court, the Fifth Circuit court's decision will inevitably be cited as an authority for undercutting this and other fundamental principles the Court stressed in *44 Liquormart* and its other recent cases.

### II. The panel majority's failure to properly apply *44 Liquormart* makes review by this Court essential.

The panel majority's opinion reflects deep misunderstanding and confusion regarding the effect of *44 Liquormart*. In addition, the conflicting decisions of the circuit courts that have reviewed the ban in light of *44 Liquormart* show that there is potential for inconsistent results in the application of *44 Liquormart*. The Court should grant this petition in order to provide lower courts additional clarification regarding the standard of review that should generally apply to commercial speech restrictions and, in particular, the standard that should apply to a commercial speech restriction, such as the one at issue here, that the government imposes in an effort to suppress an activity that it believes is undesirable.

#### *A. The panel majority's heavy reliance on* Posadas *and* Edge *was erroneous.*

At the outset of its opinion, the panel majority made it clear that it would resist the Court's guidance in

*44 Liquormart*, asking rhetorically, "has the Supreme Court gone over the edge in constitutionalizing speech protection for socially harmful activities?" Pet. App. 3a. The panel majority went on to conclude that "after *44 Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear." Pet. App. 7a. The panel majority seemed to say that, because it believed that *44 Liquormart* was unclear in some respects, the circuit court was free to adopt the legal standard it preferred, namely a *Posadas*-inspired exception to *Central Hudson* permitting wholesale advertising restrictions where such advertising concerned so-called vice activities.

The salient error in this approach lies in the fact that, whatever uncertainty may exist in the relevant jurisprudence after *44 Liquormart*, there is no lack of clarity regarding the invalidity of *Posadas*. Justice Stevens, writing in *44 Liquormart* on behalf of four justices, stated that "*Posadas* erroneously performed the First Amendment analysis" and that the Government "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *44 Liquormart*, 517 U.S. at 509-10, 116 S. Ct. 1511. In her concurrence, and on behalf of an additional four justices, Justice O'Connor wrote:

> It is true that *Posadas* accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations



> furthered the government's interest and were no more extensive than necessary to serve that interest. Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny .... In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.

*Id.*, 517 U.S. at 531-32, 116 S. Ct. at 1522 (citations omitted).

Thus, insofar as deference to legislative judgment is concerned, *44 Liquormart* could not be more clear. Courts may no longer exercise the deference to what the legislature believes to be reasonable permitted in *Posadas*, and the Government must prove -- with evidence presented in a court of law -- that its commercial speech bans directly and materially advance

substantial governmental interests and are narrowly tailored to do so. But, rather than take the "closer look" that Justice O'Connor discussed, the panel majority clung tightly to *Posadas*, citing that case no fewer than nine times.

***1. The panel majority impermissibly relied on* Posadas *as the basis for its conclusion that the Government's ban met* Central Hudson*'s third prong.***

Both in *Valley Broadcasting* and in *Players International*, courts reviewing the legitimacy of the Government's ban in the wake of *44 Liquormart* found that the ban failed the third prong of the *Central Hudson* inquiry. Those courts concluded that the ban's conflicting exceptions so completely undercut its effectiveness that it could not directly and materially advance the Government's asserted interest in suppressing public participation in gaming. Here, the panel majority did not even acknowledge the existence of *Players International*, and it quickly brushed aside the conflicting decision of the appeals court in *Valley Broadcasting* -- ignoring the telling significance of this Court's refusal to review that decision -- by simply concluding that the Ninth Circuit court relied on an incorrect reading of *Rubin* when it found that the myriad of inconsistent exceptions to the ban prevented it from materially advancing the Government's asserted interest. The panel majority reiterated its pre-*44 Liquormart* view that, in enacting the ban, the Government made "legitimate, quintessentially legislative choices" that the panel majority would



neither review nor disturb. Pet. App. 33a (original opinion) and 9a (opinion on remand).

The panel majority incorrectly relied upon *Posadas* for its contention that it was right while the *Valley* court was wrong. Citing *Posadas*, the panel majority stated, precisely as it had in its pre-*44 Liquormart* opinion, that proof that the Government's ban directly advances the Government's interests was "evident from the casinos' vigorous pursuit of litigation to overturn it." Pet. App. 32a (original opinion) and 10a (opinion on remand). But *44 Liquormart* explicitly prohibited such reasoning. In that case, Justice Stevens stated that the mere fact that the plaintiffs challenged a speech restriction in no way provided evidence of the restriction's effectiveness. *44 Liquormart,* 517 U.S. at 506, n.16; 116 S. Ct. at 1510, n. 16. Relying on *Posadas* instead of *44 Liquormart*, the panel majority eviscerated the third prong of the *Central Hudson* test, by holding that the Government automatically satisfied *Central Hudson*'s third prong the moment Broadcasters filed a lawsuit to vindicate their rights under the First Amendment.[4]

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[4] Furthermore, the panel majority's reasoning ignored the important fact that, in this case, it is not casinos that challenged the ban, it is Broadcasters, who must compete with other media that are permitted to publish advertising of gaming at private casinos. Given the option, casinos would probably divert a larger portion of their existing advertising budgets to broadcast media. But, that diversion would not necessarily equate with a net increase in gaming advertising and not at all with any increase in

The panel majority also based its belief that the Government had no burden to furnish evidence under *Central Hudson*'s third prong on a mistaken conclusion that "*44 Liquormart* does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised." Pet. App. 8a. But, even if it were reasonable to assume that demand for a product would be somewhat lower where advertising for that product was suppressed, "without any finding of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the . . . advertising ban will *significantly* advance the State's interest . . . ." *44* Liquormart, 517 U.S. at 505, 116 S. Ct. at 1509 (emphasis supplied); *see also, Rubin*, 514 U.S. at 487-88, 115 S. Ct. at 1592. Such a conclusion is especially warranted where, as here, there is simply "little chance that [censoring broadcast gaming advertising] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.*, 514 U.S. at 489, 115 S. Ct. at 1593.[5] Thus, the panel majority improperly relied upon "speculation or conjecture"

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public participation in gaming.

[5] The failure of the Government to present evidence supporting its ban is particularly telling, given the fact that enforcement of the ban has been suspended in ten states where courts have found the ban unconstitutional. If the ban were truly effective, then its suspension would cause demonstrable harm, but it has not.



regarding the efficacy of the Government's advertising ban. *44 Liquormart,* 517 U.S. at 507, 116 S. Ct. at 1510.

***2. The panel majority erroneously relied on* Edge *as the basis for its conclusion that the Government's ban met* Central Hudson*'s fourth prong.***

The panel majority attempted to make much of selected dicta in *Edge*. Pet. App. 2a-3a and 17a. There, the Court said that Congress might not have been compelled by the First Amendment to create the exception to the gaming advertising ban that permits broadcasters located in states that operate lotteries to advertise any state-sponsored lottery. *Edge*, 509 U.S. at 428, 113 S. Ct. at 2704. But the fact is, Congress did create this and numerous other exceptions and, in so doing, undercut whatever integrity the advertising ban ever may have had. In addition, unlike the statute the Court reviewed in *44 Liquormart* and unlike the statute under review here, the state lottery exception was designed to regulate advertising only in states where the advertised product was illegal. Thus, *Edge* continues to be a valid precedent after *44 Liquormart*, but only because the advertising at issue in *Edge* proposed a transaction that was illegal in the state where it was broadcast. *44 Liquormart*, 517 U.S. at 509, 116 S. Ct. at 1511. As Justice Stevens cautioned in *44 Liquormart*, *Edge* most certainly does not establish the degree of deference to Congress to which the Government is entitled where it undertakes to suppress speech about

lawful conduct. *Id.* Yet, the panel majority explicitly relied on *Edge* when it held that this Court's cases "[do] not inhibit all legislative flexibility in confronting challenging social developments." Pet. App. 18a. The panel majority's heavy reliance upon *Edge* was misplaced.

*Edge* is readily distinguishable from this case in another important respect. In *Edge*, the Court upheld the state lottery exception on the basis that it was narrowly tailored to serve an interest in balancing the competing policies of lottery and non-lottery states. *Edge*, 509 U.S. at 435, 113 S. Ct. at 2708. Here, on the other hand, the Government asserted an entirely different interest -- one that is inconsistent with the federalism interest identified in *Edge*. The Government seeks here to protect the interests of the handful of non-gaming states at the expense of the interests of the many gaming states. Thus, the irrationality of the Government's ban is complete. On the one hand, the overall scheme is intended to serve one interest, while on the other hand, a component of the scheme, the state lottery exception, is intended to serve another interest that is mutually inconsistent with the overall purpose of the ban. This is precisely the kind of logical inconsistency that cannot withstand First Amendment scrutiny after *44 Liquormart* and *Rubin*.



***B. The panel majority's treatment of compulsive gambling cannot salvage the Government's ban under* Central Hudson.**

The panel majority acknowledged that, after *44 Liquormart*, "little deference can be accorded to the state's legislative determination that a commercial speech restriction is no more onerous than necessary to serve the government's interests." Pet. App. 10a-11a. The panel majority also acknowledged that the Government's last-minute treatment of compulsive gambling in its supplemental brief on remand was not only procedurally inappropriate, but it was also entirely unavailing, because it failed to establish any connection between broadcast advertising for casino gaming and compulsive gambling. Pet. App. 11a-13a.

But notwithstanding these findings, the panel majority then proceeded to introduce its own research and argumentation regarding compulsive gambling. Pet. App. 11a, n. 9; 12a-13a, n. 10; 14a, n.11; 15a, n.12. Like the Government, the panel majority did not provide the qualifications of any of the sources it cited. Its citations, like the Government's, embodied hearsay in its most objectionable form, and none of them even remotely established a link between broadcast advertising for private, state-regulated casino gaming and compulsive gambling.[6] Surely, the panel majority's

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[6] In fact, the only citation offered by the panel majority that mentioned advertising at all was a quotation

citations are not the kind of evidence of direct advancement and narrow tailoring that this Court requires where the Government deprives certain of it citizens of the right to speak about certain lawful activities.

Even assuming, purely for the sake of argument, that compulsive gamblers are susceptible to broadcast advertising, the current ban is conspicuously ill-suited to shielding compulsive gamblers from it. Broadcasters are encouraged to air advertisements that feature gaming conducted on Indian reservations and are permitted to broadcast advertisements that feature parimutuel betting and other sports betting (*see* Report and Order in MM Docket 83-842, *In the Matter of Elimination of Unnecessary Broadcast* Regulation, 56 Rad. Reg. 2d (P&F) 976, 49 Fed. Reg. 33,264 (1984)), as well as state-operated lotteries. *See* 47 C.F.R. § 73.1211(c)(1) (Pet. App. 64a). Broadcasters may air advertisements that use the word "casino" where it is part of the

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from a newspaper article by William Safire, a popular syndicated columnist, who stated that "many psychiatrists suggest" that "a significant number of gamblers" were encouraged to gamble by casino advertising. Pet. App. 12a, n. 10. The citation did not even refer to broadcast advertising of private casino gaming, which is the only kind of advertising banned by the Government. One can only wonder what Mr. Safire's "many psychiatrists" would think about the efficacy of a ban that singles out one advertising medium and one form of gaming, while allowing compulsive gamblers wholesale access to other gaming information from other media.



advertiser's name, as well as advertisements that convey the atmosphere of casinos and tout the "non-stop Vegas-style excitement" available at casinos. Memorandum Opinion and Order, *In re WTMJ, Inc.*, 8 FCC Rcd. 4354 (Mass Media Bureau 1995). Permissible advertisements for casinos routinely feature images of enthralled casino patrons, as well as flashing lights and other elements of casino decor "that combine to create the ambiance popularly associated with Las Vegas establishments." *Id.* Thus, the Government's ban cannot reasonably be expected to materially advance an interest in preventing or treating compulsive gambling.[7]

The panel majority further stated that Broadcasters "have identified no non-speech-related alternatives to § 1304 as a means of assisting anti-gambling states" in combating compulsive gambling. Pet. App. 17a. This is a remarkable oversight, since Broadcasters' reply brief on remand enumerated seventeen such alternatives. In the first place the

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[7] Even if the Government were able to show that its ban materially reduced compulsive gambling and was narrowly tailored to do so, it would still not satisfy its burden under *Central Hudson*, because the Government's asserted interests are much broader than a limited concern with compulsive gambling. The Government has consistently alleged that its ban serves two interests: suppression of public participation in gaming and backstopping the policies of the handful of states that still prohibit gaming. Nothing in the Government's or the panel majority's treatment of compulsive gambling explains how the ban affects overall public participation in gaming.

Government arguably has the constitutional authority to outlaw gaming, but it has chosen not to do so. In addition, a variety of other approaches to compulsive gambling are available. For example, the Government could easily sponsor or mandate: (1) in- and out-patient treatment programs for compulsive gamblers, (2) prevention and educational programs in schools and communities, (3) crisis and intervention services, (4) referral services, (5) toll-free counseling hotlines, (6) public service announcements in broadcast and other media, (7) training for counselors and other professionals who deal with compulsive gamblers, (8) distribution of informational brochures at casinos, (9) informational and educational displays at casinos, (10) publication of hotline numbers at all casinos and on all casino documentation, (11) development of gambling awareness curricula in concert with educational institutions, (12) distribution of informational and educational videos, (13) informational inserts in governmental employee paychecks, (14) certification programs for compulsive gambling counselors, (15) informational and educational programs for prison inmates, and (16) youth awareness programs. "The ready availability of such alternatives . . . demonstrates that the fit between the ends and means is not narrowly tailored." *44 Liquormart*, 517 U.S. at 530, 116 S. Ct. at 1522 (O'Connor, J., concurring). "It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal" of preventing and treating compulsive gambling. *Id.*, 517 U.S. at 507, 116 S. Ct. at 1510 (Stevens, J.). The panel majority's



complete indifference to the multitude of alternative means of gaming regulation is a grievous misinterpretation of commercial speech doctrine after *44 Liquormart*. The Court should grant this petition in order to correct that error.

## III. The Court's reasoning in *44 Liquormart* supports strict scrutiny of the Government's advertising ban.

The conflict between the courts in *Valley Broadcasting* and *Greater New Orleans* shows that *44 Liquormart* has engendered confusion among the lower courts. The Court should use this case as a vehicle to clarify the guidance the Court offered in *44 Liquormart*, because this case involves precisely the kind of commercial speech restriction that, under any of the opinions furnished by the Court in *44 Liquormart*, contravenes the First Amendment. The Government imposes a total ban on Broadcasters' right to disseminate truthful, non-misleading information about certain kinds of lawful gaming. The ban is not aimed at preserving a fair bargaining process. Instead, its object is entirely paternalistic, namely to suppress the participation of consumers in those certain forms of lawful gaming it targets. Broadcasters respectfully urge the Court to clarify its guidance in *44 Liquormart*, by holding that any commercial speech restriction that serves a paternalistic interest in keeping citizens ignorant of a lawful commercial activity is presumptively invalid and is subject to strict scrutiny under the First Amendment.

When, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 , 96 S. Ct. 1817 (1976), the Court initially extended First Amendment protection to commercial speech, it did so for essentially the same reasons that it protected noncommercial speech. The Court stated:

> There is, of course, an alternative to this highly paternalistic approach [of allowing a government to keep its citizens in ignorance]. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the danger of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

*Virginia State Board*, 425 U.S. at 770, 96 S. Ct. at 1829. The Court held that the interests of those who publish commercial speech are as important as the interests of those who hear it: "we may assume that the advertiser's interest is purely an economic one. That hardly disqualifies him from protection under the First Amendment." *Id.*, 425 U.S. at 762, 96 S. Ct. at 1826.



Recent commenters have also suggested that "the commercial/noncommercial distinction makes no sense." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (May 1990). In that article, Judge Alex Kozinski of the Ninth Circuit Court of Appeals concluded that commercial speech should be offered the same level of protection as noncommercial speech, observing that, "in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature." *Id.* at 652. Kathleen M. Sullivan, Stanley Morrison Professor of Law at Stanford University, notes that the compelling reason for protecting core political speech, namely the self-evident interest of incumbent governments in quashing opposition, has application to the protection of commercial speech as well, for although politicians may not compete directly with those in private industry, they do serve constituents, and "to the extent that government is captured by private interest groups, it might well have an incentive to suppress the speech of those groups' competitors." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123,136-37.[8]

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[8] It is worth noting that the Government's advertising ban exempts advertising for government-operated lotteries of all types. As Sullivan notes, the Court's decision in *Posadas* provided a glaring example of this problem. In that case, Puerto Rico banned advertising

In *44 Liquormart* the Court adhered to the principles underlying *Virginia State Board*, but the three major opinions did so in different ways. Justice Thomas sharply rejected the paternalistic approach supported by the panel majority in this case. He argued that any governmental effort to suppress demand by suppressing advertising is "per se illegitimate," because the government can have no legitimate interest in keeping "users of a product or service ignorant in order to manipulate their choices in the marketplace." *44 Liquormart*, 517 U.S. at 518, 116 S. Ct. at 1515-16. Justice Stevens, joined by Justices Kennedy and Ginsburg on this point, proposed a standard of review which would apply strict scrutiny to commercial speech restrictions, such as the Government's gaming advertising ban, that suppress "dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." *Id.*, 517 U.S. at 501, 116 S. Ct. at 1507.[9] Although, unlike Justice Thomas, Justice Stevens did not find that paternalistic speech restrictions were illegitimate per se, he stated that "special care" must attend any review of "regulations that seek to keep people in the dark for what the government perceives to

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for casinos that competed with the Commonwealth's public lottery, which it advertised freely. *Id.*

[9] Justices Stevens, Kennedy and Ginsburg proposed "less than strict" scrutiny for application to commercial speech restrictions aimed solely at protecting consumers from "misleading, deceptive, or aggressive sales practices." *Id.*, 517 U.S. at 501, 116 S. Ct. at 1507.



be their own good." *Id.*, 517 U.S. at 502-03, 116 S. Ct. at 1507-08. In the third major opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, applied *Central Hudson* and invalidated Rhode Island's ban on liquor advertisements, because the state had other methods of suppressing alcohol consumption, such as increased taxation, rationing and conducting educational campaigns, that would "more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers." *Id.*, 517 U.S. at 530, 116 S. Ct. at 1521. Although Justice O'Connor's concurrence suggested that there might conceivably be some paternalistic commercial speech restrictions that would be narrowly tailored enough to survive *Central Hudson*'s fourth prong, Justice Thomas noted that such a law would be hard to imagine, since "it would seem that directly banning a product (or rationing it, taxing it, controlling its price or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test" as Justice O'Connor applied it. *Id.*, 517 U.S. at 524-25, 116 S. Ct. at 1519.

Thus, the three main opinions set forth in *44 Liquormart* treated a paternalistic ban on commercial speech intended to suppress demand for the advertised product in the same way that they might have treated a

ban on ordinary, fully protected speech.[10] As in this case, the government in *44 Liquormart* banned advertising in an effort to suppress consumption of the advertised products. Under ordinary First Amendment analysis, such a ban would have been strictly scrutinized. In their opinions, Justices Thomas and Stevens explicitly supported the application of strict scrutiny. Justice O'Connor, in essence, applied strict scrutiny by finding that the existence of non-speech means of regulation, which are always available, will always cause such a ban to fail *Central Hudson*'s fourth prong.

The error to which the panel majority succumbed in this case, and any remaining confusion after *44 Liquormart*, can be eliminated by removing from the scope of the *Central Hudson* test all commercial speech restrictions that are intended to serve a governmental interest in regulating non-speech commercial activity.

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[10] Justice Scalia, writing separately, expressed discomfort with the *Central Hudson* test, but concurred with Justice Stevens that the restrictions under review could not survive it. It should be noted that, writing for the majority in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992), Justice Scalia held that even the proscribable forms of expression, such as obscenity and "fighting words," are protected against wholesale content-based restrictions that are unrelated to the reason for the proscription. Here, the Government's ban is not based upon the commercial nature of the speech involved, but on the fact that it refers to gaming. Justice Scalia's holding in *R.A.V.* suggests that such a ban should be subject to strict scrutiny.



Such paternalistic speech restrictions, which "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth" *(44 Liquormart*, 517 U.S. at 503, 116 S. Ct. at 1508 (citing *Central Hudson*, 447 U.S. at 575, 100 S. Ct. at 2356)), "not only hinder consumer choice, but also impede debate over central issues of public policy." *Id.* (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96, 97 S. Ct. 1614, 1620 (1977)). Such restrictions should be subject to strict scrutiny. Under such a standard of review, the Government's gaming advertising ban must certainly fail.

## CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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September 1998

# APPENDIX

**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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**No. 94-30732**

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**GREATER NEW ORLEANS BROADCASTING ASSOCIATION, ET AL.,**
**Plaintiffs-Appellants,**

**versus**

**UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,**
**Defendants-Appellees.**

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**Appeal from the United States District Court for the Eastern District of Louisiana**

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**July 30, 1998**

**ON REMAND FROM THE UNITED STATES SUPREME COURT**

**Before POLITZ, Chief Judge, JONES, and PARKER, Circuit Judges.**

**EDITH H. JONES, Circuit Judge:**

The Supreme Court remanded this case for reconsideration in light of 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495 (1996). Concluding that 44 Liquormart requires us to revise the Central Hudson[1] analysis in our previous opinion, we amend that opinion but nevertheless affirm the judgment of the district court.

What seemed a fairly straightforward analysis when this panel first considered the constitutionality of the federal statute prohibiting the broadcast of radio and television advertisements for casino gambling, 18 U.S.C. § 1304, has dissolved into a welter of confusion following 44 Liquormart. On one hand, in 1993, the Supreme Court upheld a companion provision that bans some broadcast advertising of state-sponsored lotteries, and five Justices approved the following statement:

> In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery

[1]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S. Ct. 2343 (1980).



> advertisements, even by stations in States that have legalized lotteries.

United States v. Edge Broad. Co., 509 U.S. 418, 428, 113 S. Ct. 2696, 2704 (1993). On the other hand, after 44 Liquormart was decided, the Ninth Circuit felt obliged to hold unconstitutional the provision at issue in this case, which bans radio and television advertisements for privately-run casino gambling.[2] Has Edge lost its edge in the succeeding five years? Or on the contrary, has the rule of Edge, become a constitutional mandate? Such that Congress can now ban broadcast advertisements for gambling only in states that prohibit such gambling? Finally, has the Supreme Court gone over the edge in constitutionalizing speech protection for socially harmful activities? The following discussion will suggest that the Supreme Court's jurisprudence has become as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned.[3]

[2]See Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998).

[3]See 44 Liquormart, 517 U.S. 484, 116 S. Ct. 1495 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S. Ct. 1585 (1995).

To put the discussion in perspective, it is necessary to review this court's previous application of the Central Hudson balancing test to § 1304. Section 1304 prohibits broadcast advertising of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes depending in whole or in part upon lot or on chance . . . ." This court applied the four-part test set forth in Central Hudson to determine whether § 1304 is a permissible regulation of commercial speech. Central Hudson recognized that truthful, non-misleading commercial speech is entitled to limited protection under the First Amendment. The first two prongs of the test are satisfied here: the casino owners' speech concerns lawful activity and is not misleading, and the government asserts substantial public interests in discouraging public participation in commercial gambling and in assisting states that restrict gambling by regulating broadcasting that is beyond the states' regulatory powers.[4]

The majority and dissent in our earlier opinion parted company over application of the third Central Hudson standard, which inquires whether the advertising ban contained in § 1304 "directly advances the governmental interest asserted." The majority relied on numerous assertions by the Supreme Court that the purpose and effect of advertising are to increase

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[4]See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341, 106 S. Ct. 2968, 2977 (1986) ("We have no difficulty in concluding that the Puerto Rico legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest.").



consumer demand and, conversely, that limits on advertising will dampen such demand. See Edge, 509 U.S. at 433-34, 113 S. Ct. at 2707; Posadas, 478 U.S. at 342, 106 S. Ct. at 2977; Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353. The majority distinguished the Supreme Court's striking down of a federal prohibition on labeling the alcoholic strength of beer, where the entire legislative scheme represented an "irrational" patchwork and actually approved promotional advertising of stronger alcoholic beverages. Rubin v. Coors Brewing Co., 514 U.S. 476, 486-87, 115 S. Ct. 1585, 1591-92 (1995). The panel's dissent, however, relied heavily on Rubin to emphasize that federal law embodies a ban on advertising various forms of gambling "so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest."[5] Greater New Orleans Broad. Ass'n. v. United States, 69 F.3d 1296, 1304 (Politz, C.J., dissenting), vacated, 117 S. Ct. 39 (1996).

This Court's majority and dissenting decisions also disagreed about the fourth Central Hudson criterion, which analyzes whether § 1304 cabins speech no more than necessary to serve the government's interests. The majority relied on an

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[5]Excepted from § 1304's application are advertisements for (1) fishing contests, 18 U.S.C. § 1305; (2) wagers on sporting events, 18 U.S.C. § 1307(d); (3) state lotteries, Id. § 1307(a)(1), (2); (4) Indian gaming of all types, 25 U.S.C. § 2701; (5) charitable lotteries, 18 U.S.C. § 1307(a)(2)(A); (6) governmental lotteries, Id. § 1307(a)(2)(A); and (7) occasional and ancillary commercial lotteries, Id. § 1307(a)(2)(B).

understanding that this prong of Central Hudson is not a "least restrictive means" test and that it requires only that the regulation's restrictions reasonably fit the desired objective. See Greater New Orleans Broad., 69 F.3d at 1302 (citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 630-31, 115 S. Ct. 2371, 2379 (1995)). The majority then relied on Posadas, a decision which granted deference to the tailoring decision of the Puerto Rican legislature. See Greater New Orleans Broad., 69 F.3d at 1302. In Posadas, Puerto Rico was permitted to ban casino gambling advertising aimed at its residents, while permitting them to be solicited for other wagering games like cock fights. This court's dissenting member believed, however, that the § 1304 broadcast advertising ban is overbroad, because it fails to accommodate the policies of states that have legalized casino gambling. See id. at 1304 (Politz, C.J., dissenting).

After our panel issued its split decision, 44 Liquormart became the Supreme Court's newest pronouncement on the protection of commercial speech under the first amendment. At issue in 44 Liquormart was the constitutionality of a Rhode Island law that banned all advertisement of liquor prices outside the beverage stores' sales premises. The Supreme Court overturned the statute, and while the Court declined to modify the Central Hudson test, it divided over the interpretation of the third and fourth prongs. Justice Stevens, writing for four members, would require Rhode Island to show, for purposes of the third prong, that the statute directly advanced the state's asserted interest in promoting temperance by demonstrating that the advertising ban significantly reduced alcohol consumption. See 44 Liquormart, 517 U.S. at 505-06, 116 S. Ct. at 1509-10. Justice O'Connor, writing for three members of



the court, pointedly declined to adopt Justice Stevens's approach on the third prong. See id. at 529-32, 116 S. Ct. at 1521-22 (O'Connor, J., concurring). Thus, after 44 Liquormart, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear.

The Court was nearly uniform, however,[6] concerning Central Hudson's fourth prong: the justices were willing to scrutinize more carefully whether the state's chosen regulation of commercial speech is closely enough tailored to serve the governmental interests without unduly burdening free speech. In particular, the Court decided, in the context of an outright ban of certain commercial speech,[7] to consider the availability of other, non-speech-related policies or measures that would more directly accomplish the state's purposes. Because the state's asserted goal was to deter price competition, in order to keep prices high and ultimately reduce liquor consumption, the Court pointed out the availability of taxation and minimum price regulation to accomplish that objective directly.

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[6]Justice Thomas would abandon Central Hudson altogether and accord "commercial speech" the full protection of the First Amendment. See 44 Liquormart, 517 U.S. at 518-28, 116 S. Ct. at 1515-20 (Thomas, J., concurring). Justice Scalia, while indicating discomfort with Central Hudson, was not ready to abandon it yet but concurred only in the judgment overturning the statute. See id. at 517-18, 116 S. Ct. at 1515 (Scalia, J., concurring).

[7]No alternative channels were permitted for liquor sellers to publicize the price of their products off-premises.

Eight members of the Court also ruled out the deference to the legislature demonstrated in the Posadas case with respect to restrictions on commercial speech. As Justice O'Connor put it,

> The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the state to show that the speech restriction directly advances its interest and is narrowly tailored.

44 Liquormart, 517 U.S. at 531-32, 116 S. Ct. at 1522.

The broadcasters rely heavily on Justice Stevens's opinion in 44 Liquormart. Justice Stevens contended that Rhode Island could satisfy the third Central Hudson prong only on an evidentiary showing that the price advertising ban would significantly reduce alcohol consumption. His approach, however, did not command majority support on the Court and, viewed in the context of that case, does not alter this facet of the Central Hudson standard. The state was using a speech restriction to influence consumption indirectly by affecting liquor prices rather than either using a speech regulation directly to shrink the demand for liquor or by simply regulating its price. The connection between the speech regulation and state policy was not "direct." Indeed, 44 Liquormart does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised. See, e.g., Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353



(finding "an immediate connection between advertising and demand for electricity").

Having sketched both this court's previous opinion and 44 Liquormart, we turn to the remand.

To the extent that the Court's remand provides a general opportunity to reconsider our opinion, it must be noted that the Ninth Circuit in Valley Broadcasting Co. v United States, 107 F.3d 1328 (9th Cir. 1997), agreed with the dissenter in this case and concluded that § 1304 could not materially advance the government's interest in discouraging casino gambling. The Ninth Circuit relied upon an exception in § 1304 that expressly permits broadcast advertising for Indian-operated casino gambling, as well as exceptions that permit similar promotion of state lotteries and local charitable gambling,[8] and found these provisions as inconsistent with the government's asserted interests as the alcohol strength regulation at issue in Rubin. The Ninth Circuit's point derives not from 44 Liquormart, but from Rubin, a decision we distinguished in the prior majority opinion. See Valley Broad., 107 F.3d at 1334-36.

We remain persuaded, for the reasons stated in our previous opinion, that Rubin does not compel the striking down of § 1304. The government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that the social impact of activities such as state-run lotteries,

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[8]See supra note 5.

Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope. That the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it. See Posadas, 478 U.S. at 342, 116 S. Ct. at 2977 ("[T]he fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.") (citing Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353). There is also no doubt that the prohibition on broadcast advertising reinforces the policy of states, such as Texas, which do not permit casino gambling. Further, as previously noted, the Supreme Court rejected in Edge the contention that permitting other forms of media to advertise certain types of gambling undercuts the government's policy interests. See Edge, 509 U.S. at 433-34, 113 S. Ct. at 2707; accord Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353; Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (5th Cir. 1983) (en banc); see also Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1313-14 (4th Cir. 1995), opinion on remand from Supreme Court, 101 F.3d 325 (4th Cir. 1996). We would be acting more out of a hunch that we were wrong on Rubin than compulsion based on 44 Liquormart if we were now to revise our third prong Central Hudson analysis.

After 44 Liquormart, however, the fourth-prong "reasonable fit" inquiry under Central Hudson has become a tougher standard for the state to satisfy. Little deference can be accorded to the state's legislative determination that a commercial speech restriction is no more onerous than



necessary to serve the government's interests. Posadas has been discredited to this extent.

The government still contends, however, that a ban on broadcast advertising for casino gambling is no more extensive than necessary to serve its interests in reducing public participation in commercial gambling and in back-stopping the policies of anti-gambling states. While not limiting its argument to the full scope of social ills historically associated with gambling,[9] the government's remand brief focuses on the broadcast advertising restriction as an effective means to counteract compulsive gambling. Unfortunately, the government's assertions concerning compulsive gambling,

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[9]The social problems encompass rises in organized crime, violence, embezzlement, fraud, see, e.g., Valley Broad., 107 F.3d at 1332, petty theft, employment problems, bankruptcy, depression, suicide, and family troubles, including debt burdens, financial and emotional neglect, abandonment, and divorce, see National Gambling Impact and Policy Commission Act: Hearings on H.R. 497 Before the Comm. on the Judiciary, 104th Cong. (Sept. 29, 1995) [hereinafter 1995 Hearings] (statement of Senator Richard G. Lugar), available in 1995 WL 572923; id. (statement of Congressman Frank R. Wolf), available in 1995 WL 572926; id. (statement of Paul Ashe, President of National Council on Problem Gambling), available in 1995 WL 572924; Blaine Harden & Anne Swardson, Addiction: Are States Preying on the Vulnerable?, Wash. Post, March 4, 1996, at A1; see also Posadas, 478 U.S. at 341, 106 S. Ct. at 2976-77 ("'[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns ... .'").

intuitively sensible though some of them are,[10] raise numerous

[10]See Appellees' Supplemental Brief at 11. Affecting senior citizens, see, e.g., Dan Herbeck, Gambling Stakes Can Be High for Senior Citizens, Buff. News, Feb. 8, 1998, at A1, adults, and children alike, see, e.g., Art Levine, Playing the Adolescent Odds, U.S. News & World Rep., June 18, 1990, at 51, compulsive gambling has been described by the American Psychiatric Association as a "'disorder of impulse control,'" Ruth Benedict, Council Prepares to Treat Compulsive Gamblers, Crain's Det. Bus., Jan. 13, 1997, at 10; see also Harden & Swardson, supra note 9 (noting that Harvard Psychology Professor Howard Shaffer has found that gambling alters the chemistry of the brain and affects the central nervous system much like a drug). Although compulsive gamblers represent a small percentage of the gambling community, they are responsible for a disproportionate share of industry revenue. See Harden & Swardson, supra note 9 (conservative estimate that compulsive gamblers contribute twenty-five percent of casino revenue). Moreover, a recent study by Harvard Medical School concluded that the number of compulsive gamblers living in the United States and Canada is rising, having grown by 1.6 million adults in the last two decades. See Derrick DePledge, Betting the next Roll Wins Study: Gamblers' Odds of Addiction Rising, Fla. Times Union, Dec. 23, 1997, at C1. The study estimated total number of compulsive gamblers at 3.8 million. See id.

Experts attribute these rising numbers to the growing acceptance of gambling within America's entertainment culture, where casinos advertise as family resorts filled with the glamour and allure of easy millions. See id. (quoting Professor Shaffer). Short of prohibiting gambling altogether, limiting broadcast messages about casino gambling may indeed be one of the most effective methods of limiting a compulsive gambler's exposure to a lifestyle that can be as irresistible as it is socially destructive. See, e.g., William Safire, A Gambling Lesson: There's Now a Sucker Born Every Second, Dallas Morning News, June 6, 1998, at 11A ("[M]any psychiatrists suggest[] that a significant number of gamblers . . . were encouraged in their addiction by the lure of casino advertising."); see Harden & Swardson, supra note 9 (noting that the increased availability of gambling is fueling the addiction).



fact issues at a belated stage of this litigation. The government's new argument suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos. If the government's burden were to establish a direct, quantitative evidentiary link among these phenomena, we do not believe it has done so. But 44 Liquormart, though more demanding on

Compulsive gamblers often suffer from financial hardship, emotional difficulties, including alcoholism, depression, stress-related diseases, and suicide attempts. See also Harden & Swardson, supra note 9; Problem Gamblers, Rolling the Dice with their Lives, Buff. News, June 25, 1996, at C1. Moreover, experts estimate that the trouble of each compulsive gambler affects the lives of ten to seventeen people. See, e.g., Gordon Johnson, Everybody Loses, Press-Enterprise, Jan. 25, 1998, at D1. Very often, the gambler's loved ones must endure emotional turmoil, financial neglect, abuse, and divorce. Studies also suggest that children of compulsive gamblers perform worse academically, are more likely to become alcoholics, develop gambling problems themselves, develop eating disorders, experience periods of depression, and attempt suicide. See Appellees Supplemental Brief at 13-14 (citing Douglas A. Abbot et al., Pathological Gambling and the Family: Practice Implications, 76 Fam. Soc. 213, 216-17 (1995); Mark Dickerson, Gambling: A Dependence without a Drug, 1 Int'l Rev. Psych. 157, 162 (1989); Durand F. Jacobs et al., Children of Problem Gamblers, 5 J. Gambling Behav. 261 (1989)). One observer concluded that in some respects, the harm a compulsive gambler inflicts upon his children and his family is really much greater than an alcoholic or drug addict. See Harden & Swardson, supra note 9.

the fourth prong of Central Hudson, does not appear to establish an insurmountable test.

The federal government's policy toward legalized gambling is consciously ambivalent. What began as a prohibition on all interstate lottery advertising has been successively, but gingerly modified to respect varying state policies and the federal government's encouragement of Indian commercial gambling. The remaining advertising limits reflect congressional recognition that gambling has historically been considered a vice; that it may be an addictive activity;[11] that the consequences of compulsive gambling addiction affect

[11]See, e.g., 1995 Hearings, supra note 9 (statement of Paul Ashe, President of National Council on Problem Gambling) (noting that the American Medical Association recognized pathological gambling as an addiction in 1994); see also Harden & Swardson, supra note 9 ("Gambling researchers and psychotherapists agree that the increased availability of legal gambling is fueling increased addiction.").



children, the family, and society;[12] and that organized crime is often involved in legalized gambling.[13]

In both Edge and Posadas, federal and territorial governmental decisions to discourage certain types of gambling, while couched in ambivalence similar to that contained in § 1304, were nevertheless regarded as justifiable. Moreover, in Edge, the restriction on broadcasting by a non-lottery-state station was upheld despite the fact that over ninety percent of the station's listeners lived in a state where the lottery is legal. The Court was persuaded that controlling access to broadcast lottery advertising by thousands of local North Carolina households furthered North Carolina's anti-lottery policy. See Edge, 509 U.S. at 428-30, 113 S.Ct. at 2704-05.

A direct inference from Edge would therefore be that if the federal government may pursue a cautious policy toward the promotion of commercial gambling, then it may use one

[12]See, e.g., 1995 Hearings, supra note 9 (statement of Paul Ashe, President of National Council on Problem Gambling) (noting that the American Medical Association recognized pathological gambling as an addiction in 1994); see also Harden & Swardson, supra note 9 ("Gambling researchers and psychotherapists agree that the increased availability of legal gambling is fueling increased addiction.").

[13]See, e.g., Valley Broad., 107 F.3d at 1332 (discussing hearings before President's Commission on organized crime).

means at its disposal -- a restriction on broadcast advertising[14] -- to control demand for the activity. Further, it may do so even though the restriction will "deprive" the casinos of their opportunity to reach potential customers by one method of advertising in states where they legally operate.

44 Liquormart does not undercut this reasoning. The blanket ban on price advertising there was viewed as too great an imposition on speech because it was (a) comprehensive and (b) an indirect, imperfect tool for manipulating prices compared with alternative direct policies such as minimum prices or taxation.

By these tests, § 1304 cannot be considered broader than necessary to control participation in casino gambling. First, there is no blanket ban on advertising. The ban is more analogous to a time, place and manner restriction. Other media remain available, such as newspapers, magazines and billboards, and indeed broadcast advertising of casinos, without reference to gambling, is permitted. Section 1304 simply targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children. Second, regulation of promotional advertising directly influences consumer demand, as compared with the indirect market effect criticized in 44 Liquormart. Moreover, the efficacy of non-advertising-related means of discouraging casino gambling is purely hypothetical, as such measures

[14]It is postulated that advertising stimulates demand.



would have to compete with the message of social approbation that would simultaneously be conveyed by unbridled broadcast advertising. Section 1304, in short, is tailored to fit the statutory purpose of controlling demand and does not unduly burden speech.

The government also defends the nationwide prohibition of this advertising as necessary to enforce the policies of non-casino -gambling states like Texas. The broadcasters view this restriction as overbroad and assert that only an Edge-like compromise, whereby broadcasters in pro-gambling states could advertise their casinos while non-gambling-state broadcasters could not do so, is constitutionally mandated by the narrow tailoring test. Perhaps the Supreme Court will see it this way; or perhaps the Supreme Court will overrule Edge as inconsistent with its cases in the ensuing five years. But 44 Liquormart does not provide any basis for reaching such results, and the broadcasters have identified no non-speech-related alternatives to § 1304 as a means of assisting anti-gambling states. If § 1304 can be upheld on the basis of protecting the non-gambling states, then it is reasonable for the broadcast ban to be nationwide in effect. As Edge stated, and we earlier noted,

> In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries.

509 U.S. at 428, 113 S. Ct. at 2704. Central Hudson, as applied after 44 Liquormart, does not inhibit all legislative flexibility in confronting challenging social developments.

Moreover, if this remand opinion is wrong, and § 1304 is invalidated, there will be no federal protection for non-casino-gambling states, and their citizens will be subject to the influence of broadcast advertising for privately owned casinos. This is not a neutral position; it is one that effectively awards federal sanction to an activity that is again coming to be viewed with moral and utilitarian suspicion.[15] Historically, state and local government policies toward legalized gambling have oscillated between prohibition and regulated legalization, as the social problems gambling stimulates have risen and fallen. What is needed is legislative flexibility, so that the people's representatives can respond to the varying consequences of legalized gambling. If court decisions decree unbridled advertising of "truthful, non-misleading speech" however, the legislature's flexibility will be impaired. In the case of gambling, the consequences may be stark: whatever is legal may be advertised; only a prohibition of gambling will justify a ban on advertising. More disturbing, whatever gambling is legal anywhere may be advertised everywhere. No local prohibition of gambling will be meaningful, and communities will be less capable of insulating themselves and their children from the deleterious influence of gambling. Doctrinal rigidity

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[15]See supra notes 9-13.



in this type of case would seem to be the enemy of federalism, of flexible representative government, and of peoples' right to make choices to protect their community and their children. Central Hudson, as applied after 44 Liquormart, does not totally foreclose such flexibility.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

POLITZ, Chief Judge, dissenting:

Having concluded previously that the federal ban on broadcast advertisement of casino gambling fails to satisfy the requirements of Central Hudson,[16] the stricter standard employed by the Supreme Court in 44 Liquormart[17] only strengthens my convictions. Thus, for the reasons assigned in my prior dissent, I must continue to dissent.[18]

The failure of the Justices to reach an agreement in 44 Liquormart about the specifics of the parameters of the constitutional review to be applied to commercial speech restrictions deprives the lower courts of the guidance a coherent, dispositive framework would have provided for evaluating these claims. The divergent analyses unnecessarily blur the boundaries of commercial speech.

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[16]Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

[17]44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[18]Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 69 F.3d 1296, 1303 (5th Cir. 1995) (Politz, C.J., dissenting).



A close reading of 44 Liquormart discloses, however, that a majority of the Court felt strongly that truthful commercial speech about lawful services should enjoy greater first amendment protections than that previously afforded. It appears manifest that the Court will no longer defer to "legislative judgment," grant "broad discretion" for "paternalistic purposes," accept the "greater-includes-the-lesser" reasoning, or defer to the "vice" exception.[19] Read together, the opinions in 44 Liquormart teach that the government must use direct methods of controlling disfavored behavior. This, combined with the heavy burden of proof that is now placed on the government, substantially undercuts the validity of laws, such as the statute at issue here, which restrict nondeceptive commercial information.

If not so viewed previously, it must now be recognized that the statutory advertising proscription at bar herein simply fails to advance directly the government's asserted interests and, accordingly, must be deemed overbroad under the heightened standards of 44 Liquormart. The numerous exceptions and inconsistencies contained in the publication ban abundantly undermine and are adverse to the asserted government interests, precluding the material advancement thereof.[20] In addition, given the many exceptions, the

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[19]44 Liquormart, 517 U.S. 484.

[20]Greater New Orleans Broadcasting Ass'n, 69 F.3d at 1304. See also Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S.Ct. 1050 (1998) (finding the same ban

government has totally failed to meet its burden of proving that a nationwide ban is mandated.

I respectfully dissent.

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at issue here to violate the first amendment after 44 Liquormart because of the numerous exceptions).



**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**GREATER NEW ORLEANS BROADCASTING ASSOCIATION, Et Al.,**

***Plaintiff-Appellant***

***v.***

**UNITED STATES of America and Federal Communications Commission,**

***Defendants-Appellees***

**NO. 94-30732**

**Appeal from the United States District Court**
**for the Eastern District of Louisiana**
**Henry A. Politz, Chief Judge.**
**(CA-94-656-C)**

**Argued July 11, 1995**

**Decided November 30, 1995**

**Before JONES and PARKER, Circuit Judges, and POLITZ, Chief Judge.**

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**Affirmed by published opinion. Judge JONES wrote the opinion, in which Judge PARKER joined and Judge POLITZ dissented.**

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## OPINION

**EDITH H. JONES, Circuit Judge:**

Greater New Orleans Broadcasters Association (GNOBA) and a group of television and radio stations in the New Orleans metropolitan area (collectively "the Broadcasters") unsuccessfully challenged in district court the constitutionality of a federal statute prohibiting the broadcast of radio and television advertisements for casino gambling. 18 U.S.C. § 1304. While recognizing that the advertisements were entitled to limited protection under the First Amendment, the district court concluded that the governmental interests served by the statute were sufficient to override the First Amendment under the Supreme Court's commercial speech jurisprudence. We affirm.



## BACKGROUND

GNOBA is a non-profit corporation organized for the purpose of representing its membership as a trade association in matters affecting the broadcast industry. Each member broadcaster of GNOBA is licensed to a primary place of business in Louisiana. The members want to broadcast advertisements for casino gambling activities, which are licensed and legal in Louisiana and in neighboring Mississippi, but have refrained from doing so for fear of criminal prosecution and sanctions pursuant to 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211, the corresponding FCC regulation.

Section 1304 prohibits broadcast advertising of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance...." 18 U.S.C. § 1304. In February 1994, the Broadcasters filed suit against the United States and the FCC seeking declaratory and injunctive relief permitting them to broadcast gambling advertisements for Louisiana and Mississippi casinos. The Broadcasters first asserted that section 1304 is inapplicable because casino gambling is not a "lottery, gift enterprise, or similar scheme" for purposes of the statute. Alternatively, the Broadcasters contended that section 1304 is an unconstitutional abridgement of their First Amendment free speech rights. The Broadcasters and the government each moved for a summary judgment.

In November 1994, the district court entered summary judgment in favor of the government. Citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the court concluded that casino advertising falls within the purview of section 1304. The court then determined that under the four-part test set forth in *Central Hudson Gas &*

*Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), section 1304 is a permissible regulation of commercial speech. The Broadcasters now appeal from both holdings.

**DISCUSSION**

[1] The Broadcasters renew their contention that section 1304 does not prohibit advertisements for casino gambling because casino games cannot be considered a "lottery, gift enterprise or similar scheme." However, this argument is foreclosed by Supreme Court precedent. In *FCC v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the Court held that the three essential elements of section 1304 are 1) the distribution of prizes, 2) according to chance, 3) for a consideration. *Id.* at 290, 74 S.Ct. at 598. Rather than disputing that casino gambling possesses these three essential elements, the Broadcasters ignore this authority entirely.

Instead, the Broadcasters choose to attack the historical underpinnings of the statute in an attempt to demonstrate that the statute was never intended to apply to casino gambling. Apparently, the Broadcasters are laboring under the misperception that this court is free to reject statutory interpretations handed down by the Supreme Court. This we cannot do. As the Broadcasters point out, section 1304 is becoming increasingly riddled with exceptions to its broad application, *see infra* note 4. That legislation has been proposed, and rejected, by Congress which would have excepted broadcast advertisements for casino gambling from



section 1304's reach,[1] reaffirms the Court's broad interpretation of section 1304 in *American Broadcasting*. Therefore, section 1304 is applicable and continues to ban the desired advertising. *Accord Valley Broadcasting Co. v. U.S.*, 820 F.Supp. 519, 524 (D.Nev.1993).

[2] Turning to the constitutionality of section 1304, the proposed advertisements fall within the Supreme Court's definition of commercial speech because they involve "expression related solely to the economic interests of the speaker and its audience" and do "no more than propose a commercial transaction." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976).

[3, 4] "[C]ommensurate with its subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978), commercial speech is entitled to only limited protection under the First Amendment.

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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[1]See 134 Cong.Rec. 12,278-82 (1988); 134 Cong.Rec. 31,073-76 (1988).

*Central Hudson,* 447 U.S. at 566, 100 S.Ct. at 2351. Applying the four-part *Central Hudson* test to the facts at hand is the crux of this case.

The first prong, whether the speech concerns lawful activity and is not misleading, is not in dispute. The government concedes that the Broadcasters seek only to broadcast truthful advertising about lawful casino gambling activities. The broadcasters have chosen to center their argument on the second prong--the nature and substantiality of the federal government's interest in prohibiting broadcast advertisements of casino gambling.

[5, 6] The government asserts two interests it contends are substantial. First, section 1304 serves the interest of assisting states that restrict gambling by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate. The second asserted governmental interest lies in discouraging public participation in commercial gambling, thereby minimizing the wide variety of social ills that have historically been associated with such activities. The district court found both of these interests to be substantial. We agree.[2]

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[2]The government may permissibly assert that multiple interests are served by a given statute, only one of which need be substantial. *See, e.g., Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 71-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983). Further, "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve." 463 U.S. 60, 71-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469. *Id.* at 71, 103 S.Ct. at 2883. *See also Doe v. Bolton,* 410 U.S. 179, 190-91, 93 S.Ct. 739, 746-47, 35 L.Ed.2d 201 (1973) (a State may readjust its views and



[7] The Broadcasters assault the federal interests in a number of ways. First, the Broadcasters attempt to characterize *United States v. Edge Broadcasting Co.,* ____ U.S. ____, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), as precluding the assertion of any substantial federal interest other than protecting state choice in gambling decisions. *Edge* makes no such broad claim. That case interpreted a companion provision to section 1304, which expressly permits advertising of state-run lotteries by broadcasters in states where the lotteries exist, while prohibiting it by non-lottery-state broadcasters. *Edge* surely determined that the government interest in protecting state choice in gambling decisions is substantial, a holding which applies here. But just as surely, it did not determine the limit of a valid federal governmental interest. *Edge* in no way suggests that the general prohibition on casino gambling advertising was rendered doubtful by the Court's approval of a "state choice" advertising policy for state lotteries. *Edge* supports rather than impairs the constitutionality of section 1304.

[8] Audaciously, the Broadcasters next challenge the federal government's interest in limiting the promotion of certain forms of gambling by means of interstate commerce. The validity as well as substantiality of the federal interest is regulating gambling's interstate manifestations, are, however, as old as the legislation prohibiting use of the federal mails for advertising state-chartered lotteries. Act of July 12, 1876, ch. 186 § 2, 19 Stat. 90, upheld in *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1877). *See also Champion v. Ames,* 188 U.S.

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emphases in light of modern knowledge). Even if one of the government's arguments falters, the other can support the statute.

321, 23 S.Ct. 321, 47 L.Ed. 492 (1903) (*Lottery Case*), sustaining under the commerce clause a federal law prohibiting interstate transportation of lottery tickets. Act of March 2, 1895, ch. 191, 28 Stat. 963. As recently as 1986, this court rejected the argument that changing mores, which have led more states to legalize various forms of gambling, should eliminate the federal interest in prosecuting violations of the federal law prohibiting interstate transportation of lottery paraphernalia. *United States v. Stuebben*, 799 F.2d 225 (5th Cir. 1986). Here the vehicle of commerce is the interstate airwaves and the commerce consists of casino gambling advertisements offered by the Broadcasters. Because Congress has the power to legislate with regard to the use of organs of interstate commerce, it has the power to determine the ends served by that power and whether federal policy will promote or inhibit the states' policies on similar subjects.[3]

[9] The Broadcasters also attack the governmental interest in discouraging public participation in commercial gambling on federalism grounds. They contend that the federal government may not assert an interest in the public's health, safety, and welfare that is contrary to state policy. In other words, the federal government has no interest in discouraging casino gambling if Louisiana has legalized it. This argument

[3]In *The Lottery Case*, Justice Harlan summed up the authorities as holding that "the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government ...; that such power is plenary, complete of itself, and may be exerted by Congress to its ultimate extent, subject *only* to such limitations as the Constitution imposes...." 188 U.S. at 353, 23 S.Ct. at 325-26 (emphasis on original).



is contrary to Supreme Court precedent.[4] The Court has consistently, and recently, noted the federal government's interest in protecting the health, safety, and welfare of its citizens. In *Rubin v. Coors Brewing Co.*, ____ U.S. ____, ____, 115 S.Ct. 1585, 1591, 131 L.Ed.2d 532 (1995), the Court struck down a federal statute prohibiting the display of alcohol content on beer labels. Analyzing the statute under *Central Hudson*, however, the Court found that the federal government's asserted interest, preventing strength wars over the content of alcoholic beverages, was substantial. *Rubin*, ____ U.S. at ____, 115 S.Ct. at 1591. The Court specifically acknowledged that the prevention of alcohol strength wars was aimed at "protecting the health, safety, and welfare of ... citizens...." *Id. See also Bolger v. Youngs Drug Products corp.*, 463 U.S. 60, 72-73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983) (federal government had substantial interest in aiding parents in the upbringing of their children). The Broadcasters have cited no contrary authority, relying instead on an amalgam of general federalism statements.

[10] Taking as valid the federal government's interest in the health, safety, and welfare of its citizens, there remains only to be determined whether the goal of discouraging participation in gambling is substantial. *Posadas de Puerto*

[4]It is also contrary to the weight of authority in the analogous cigarette advertising context. *See Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 584-86 (D.C.D.C. 1971), *aff'd*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972) (upholding constitutionality of U.S.C. § 1335 forbidding cigarette advertising via electronic media).

*Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), confirms that it is.

*Posadas* involved virtually identical facts. Although the commonwealth of Puerto Rico licensed and legalized casino gambling, it prohibited advertisements aimed at its own citizens in an attempt to discourage their participation in gambling. Upholding the constitutionality of the advertising prohibition, the Supreme Court's analysis of the second prong of the *Central Hudson* test was perfunctory: "We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.* at 341, 106 S.Ct. at 2977. Likewise, this court has no difficulty in determining that the very same federal interest is substantial.

[11] The third and fourth prongs of the *Central Hudson* analysis concern the "fit" between the interest asserted and the means employed. Having been unable to dispel the substantial federal interests, the Broadcasters face a much more difficult challenge on the last two parts of the *Central Hudson* analysis They cannot seriously dispute that a prohibition of advertising casino gambling directly advances the governmental interest in discouraging such gambling and fulfills the third *Central Hudson* prong. It is axiomatic that the purpose and effect of advertising is to increase consumer demand. *See Posadas,* 478 U.S. at 342, 106 S.Ct. at 297; *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353. As noted in both *Posadas* and *Edge*, the vigor with which the statute has been challenged confirms the efficacy of the prohibition.



The Broadcasters complain that the various exceptions to section 1304[5] so emasculate the statute as to render it ineffective in advancing the governmental interest, and indeed calls into question the genuineness of the asserted governmental interest. The same type of argument was proffered, and rejected, in *Posadas*, 478 U.S. at 342-43, 106 S.Ct. at 2977 (legislature need not forbid advertising for all games of chance to satisfy third prong of *Central Hudson*). The Court's striking down a prohibition of labelling the alcoholic strength of beer, in *Rubin, supra,* does not change this result. In that case, the Court cited a number of federal laws whose impact on the promotion of stronger alcoholic beverages varies and conflicts, and called the entire scheme irrational. ---- U.S. at ----, 115 S.Ct. at 1592. Because of these conflicts, the prohibition at issue could not achieve its purpose. That situation does not exist here. Congress has singled out particular forms of gaming for which broadcast advertising is permitted, and in so doing made legitimate, quintessentially legislative choices that the social costs of those activities were less than those of casino gambling, or the social benefits, e.g. of state-run lotteries, Indian and charitable gambling, were

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[5]Excepted from section 1304's application are advertisements for 1) fishing contests, 18 U.S.C. § 1305; 2) wagers on sporting events, 18 U.S.C. § 1307(d); 3) state lotteries, 1307()(1), (2); 4) Indian gaming of all types, 25 U.S.C. § 2701; 5) charitable lotteries, 18 U.S.C. § 1307(a)(2)(A); 6) governmental lotteries, 18 U.S.C. § 1307(a)(2)(A); 7) occasional and ancillary commercial lotteries, 18 U.S.C. § 1307 (a)(2)(B).

greater.[6] Needless to say, the statutory prohibition on broadcast advertising also reinforces the policies of states neighboring Louisiana, such as Texas, which do not permit casino gambling.

[12] The Broadcasters nevertheless argue that permitting other forms of media to advertise casino gambling undercuts the government's contention that section 1304 directly advances the asserted interests. This attack was rejected by the Supreme Court in *Edge*, ---- U.S. at ----, 113 S.Ct. at 2707. The Court explained:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.

*Id.* *See also Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353; *Dunagin v. City of Oxford*, 718 F.2d 738, 747-51 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 3554, 82 L.Ed.2d 855 (1984) (law prohibiting local liquor advertising directly advances government's interest in

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[6]The alleged underinclusiveness of section 1304 is also advanced by the Broadcasters as a ground for disputing the substantiality of the federal interest, *Central Hudson's* second prong. We reject that attack for the reasons stated above, and note that in *Rubin*, the complexity of the statutory scheme was analyzed as part of the third *Central Hudson* factor. ____ S.Ct. at ____, 115 S.Ct. at 1592.



discouraging liquor consumption despite fact that residents are exposed to liquor advertising from out-of-state sources). Therefore, section 1304 easily satisfies the third prong of the *Central Hudson* test.[7]

[13, 14] The fourth requirement, that the restriction be no more extensive than necessary to serve the government's interest, is also met. This prong of *Central Hudson* is not, as the Fifth Circuit recently observed, a "least restrictive means" test, but requires only that the regulation's restrictions reasonably fit the desired objective. *Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995), citing *Florida Bar v. Went For It, Inc.*, ---- U.S., ----, ----, 115 S.Ct. 2371, 2379, 132 L.Ed.2d 541 (1995). *Posadas* is again compelling. The Supreme Court found it "clear beyond peradventure" that the challenged Puerto Rican law satisfied the fourth *Central Hudson* prong. *Posadas*, 478 U.S. at 343, 106 S.Ct. at 2978. Section 1304 is equally tailored to the asserted governmental interests because it prohibits only broadcast advertising aimed at the promotion of casino gambling. To the extent public demand for casino gambling is reduced by section 1304, one governmental interest is fulfilled. To the extent the broadcasters cannot beam casino gambling advertisements into neighboring states that do not license private casinos, the federal government's goal of assisting states' anti-gambling

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[7]Additionally, Congress is permitted ore intrusive regulation of the broadcast media than other forms of media. *See Turner Broadcasting System, Inc. v. FCC*, ____ U.S. ____, ____, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994); *Red Lion Broadcasting Co. v. FCC*. 395 U.S. 367, 388-9, 89 S.Ct. 1794, 1805-06, 23 L.Ed.2d 371 (1969).

policies is fulfilled. No less restrictive alternative seems viable in view of the ability of broadcast signals to cross state borders. In particular, the *Edge* "state choice" policy embodies a compromise that supports states' promotion of their own lotteries. Although Congress could craft a similar compromise for advertising of casino gambling, it has rejected that course, and we do not find it constitutionally mandated.

A final note. In *Edge*, the Court stated that gambling "falls into a category of 'vice' activity that could be, and frequently has been, banned altogether", ---- U.S. at ----, 113 S.Ct. at 2703, and clearly implied that advertising of gambling can lay no greater claim on constitutional protection than the underlying activity. *See also Posadas*, 478 U.S. at 345-46, 106 S.Ct. 2979; *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 1893, 100 L.Ed.2d 425 (1988). In *Rubin*, however the Court distanced itself from this position, ---- U.S. at ---- n. 2, 115 S.Ct. at 1589 n. 2. This is too bad. Drawing a distinction for traditional vice activity, such as gambling or prostitution, would provide a clear constitutional guideline, would free legislatures to make the delicate judgements required when legislating about these activities, and would avoid repetitious litigation over *Central Hudson* in a limited category of cases. Clarity is a virtue seldom attained and too seldom even prized in constitutional law.

## CONCLUSION

In summary, section 1304 and the concomitant FCC regulation constitutionally prohibit broadcast advertisements for casino gambling. The statute directly advances the government's substantial interests in discouraging public



participation in such gambling and in enforcing states' anti-gambling policies in a manner no more extensive than necessary.[8] AFFIRMED.

POLITZ, Chief Judge, dissenting:

Persuaded that the values underlying the first amendment commercial speech doctrine compel rejection of a regulatory scheme riddled with such inconsistencies and exceptions as to result in suppression of speech without adequate justification, I must respectfully dissent.

As the Supreme Court has made abundantly clear, the first amendment protects the interest of the listener in the free flow of truthful, non-misleading commercial speech. The doctrine respects the individual's right to information relevant to the making of lawful choices[9] and to the formation and

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[8] *But see Valley Broadcasting Co.*, 820 F.Supp. at 525-27. In *Valley Broadcasting Co.*, the district court struck down as unconstitutional section 1304 finding that it did not directly advance the governmental interest asserted and was more extensive than necessary to serve the governmental interest. For the reasons stated above, we find that under a proper reading of *Central Hudson* and *Posadas*, section 1304 withstands constitutional scrutiny.

[9] *Central Hudson Gas & Elec. Corp. va. Public Serv. Comm'n of New York*, 447 U.S. 557, 562, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980) (rejecting "paternalistic" rationale for suppressing commercial speech in favor of view that people are capable of perceiving their own best interests if well-informed).

expression of opinions regarding governmental regulation of products or activities.[10]

The basis for the protection of commercial speech is not vitiated when the speech concerns lawful but potentially harmful activities, such as alcohol consumption or gambling.[11] When the government would forbid dissemination of information about things which legally may be done, the *Central Hudson* test ought be carefully conducted in order to protect these core first amendment values.

The government seeks to justify a nationwide ban on broadcasts of commercial messages discussing the gambling activities in state-licensed casinos. Given the social ills often associated with gambling, it cannot be gainsaid that the interests asserted in support of this ban are substantial. The *Central Hudson* test, however, requires that the government demonstrate that its interests are *materially* advanced by the ban,[12] and that the ban is no more restrictive than necessary to

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[10]*Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 78, 765, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1973) ("[T]he free flow of commercial information is indispensable ... to the proper allocation of resources in a free enterprise system ... [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered.").

[11]The Supreme Court recently affirmed that restrictions on speech about legal "vices" are reviewed under the *Central Hudson* standard rather than by a more deferential approach. *Rubin v. Coors Brewing Co.*, ---- U.S. ----, ---- n. 2, 115 S.Ct. 1585, 1589 n. 2, 131 L.Ed.2d 532 (1995).

[12]The "direct advancement" prong of *Central Hudson* is not satisfied by "mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial



serve that interest. Irrational regulatory scenarios in which certain provisions undermine and counteract the asserted government interest do not satisfy the "material advancement" prong of the *Central Hudson* test.[13]

The government claims an independent federal interest in discouraging public participation in commercial gambling. The restriction at bar is the awkward residual of 18 U.S.C. § 1304, originally enacted as section 316 of the Communications Act of 1934 to ban broadcast advertising of gambling. That ban is now deeply gutted by exceptions and in conflict with the policies of many states which have legalized gambling.[14] The broadcasters challenge the regulation to the extent it bans commercial broadcast messages directly referring to legal casino gambling.

A focusing of what can and cannot be done under the challenged regulation appears in order. Casinos are allowed to advertise their existence, to air the word "casino" as part of a legal name, and to refer to the non-gambling amenities within.[15] In instances where state-licensed casino gambling is advertised on billboards and in newspapers, where other legal gambling entities broadcast pro-gambling messages, and where casinos may broadcast their existence and the "excitement" to be had

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speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, ---- U.S. ----, ----, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993).

[13]*Coors*, ---- U.S. ----, 115 S. Ct. 1592.

[14]An unofficial count reflects at least 21 states.

[15]*See, e.g.*, Letter to DR Partners, 8 F.C.C.R. 44 (1992).

within, I suggest that a faithful application of *Central Hudson* compels the conclusion that the residual ban on broadcasting direct references to the games played in casinos amounts to little more than a gratuitous suppression of expression. Under these circumstances, and given the abundance of broadcast advertising for casinos, the challenged censorship serves little purpose. The government cannot show that this restriction decreases demand for casino gambling to any appreciable extent. While the government is not required, of course, to make progress on every front in advancing its interests, this ban is so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest. I am persuaded that the government has not met its burden of proving material advancement of its interest.

The government also asserts that the ban advances the federal interest in supporting policies of states which have chosen to prohibit casino gambling. Messages banned by the statute cannot be broadcast by any station licensed in the United States. Accordingly, residents of non-casino states cannot receive such messages from broadcasts originating in states where casino gambling is legal. Nor may residents of the casino states.

Recognizing a value in advancing the government's interest in aiding state anti-gambling policies, we must measure the extent of the restriction and weigh countervailing forces. The ban is nationwide. Some states allow casino gambling; some states do not. By not cabining the regulation to radio and television stations in non-casino states, the ban impinges unnecessarily on the policies of states which have legalized casino gambling. A substantial federal interest in protecting



state choice in gambling decisions, by limiting bans on lottery advertising to stations licensed by non-lottery states, was asserted and recognized in *United States v. Edge Broadcasting Co.*[16] The ban at bar is overboard and is inconsistent with the teachings of *Edge*, failing to accommodate the valid federalism interest inherent in supporting the casino-licensing states.[178]

Unlike the statutory scheme upheld in *Edge*, the ban before us allows stations in states where gambling is illegal to broadcast commercial messages promoting a gambling forum in another state, so long as the gambling activities taking place in that establishment are not explicitly referenced.[18] This "policy" simply magnifies the government's failure to prove material advancement of its interest in supporting the policies of non-casino states and guts its argument that a nationwide ban is mandated for an effective insulation of non-casino states from casino advertisements broadcast across state borders.

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[16]---- U.S. ----, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

[17]In contrast, *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), presented the issue whether a state's restriction on commercial speech is necessary to a balance of its *own* competing interests, in promoting tourism while protecting its own population.

[18]Federal Communications Commission policy allows a station in a non-casino state to broadcast an advertisement promoting a casino so long as use of the word "casino" is confined to the establishment's proper name and other references to gambling are not explicit. *See, e.g.*, Letter to Calvenar Broadcasting, Inc., 8 F.C.C.R. 32 (1992).

I respectfully dissent.



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF LOUISIANA**

**GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL**

**VERSUS**

**UNITED STATES OF AMERICA, ET AL**

**Civ. No. 94-656**
**Section "C"**

**October 31, 1994**

**ORDER AND REASONS**

This declaratory action comes before the Court on motion for summary judgment filed by the plaintiffs, Greater New Orleans Broadcasting association, Inc. ("broadcasters") and cross motion for summary judgment filed by the defendants, the United States of America and the Federal Communications Commission (collectively "FCC"), both parties having agreed that this matter can be determined summarily. Having considered the record, the memoranda of counsel and the law, the Court has determined that the motion of the plaintiffs should be denied and the motion of the defendant granted as submitted.[1]

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[1] However, in light of recent Fifth Circuit jurisprudence and despite the consensus herein, the Court will ask for further advice

Three issues concerning broadcast restrictions on casino advertising are presented to this Court on cross motion: (1) whether a stay of enforcement by the FCC in Nevada violates the equal protection clause; (2) whether prohibitions against the broadcast of certain "lottery" information apply to casino gaming; and (3) whether those restrictions violate the plaintiffs' freedom of speech, due process rights, freedom to contract and equal protection of the law under the First Amendment. These issues largely reflect those presented in Valley Broadcasting v. United States, 820 F.Supp. 519 (D. Nev. 1993), wherein the district court granted summary judgment in favor of broadcasters and struck down the broadcast advertising restrictions imposed by statute and FCC regulations.[2] That decision focused on the First Amendment challenge and found that the FCC prohibitions did not directly advance substantial government interests and were unconstitutionally broad for purposes of the commercial speech analysis set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission, 446 U.S. 557 (1980).

**EQUAL PROTECTION**

The plaintiffs' equal protection claim is directed to the decision by the FCC to stay enforcement of the challenged broadcast regulations in Nevada pending appellate review of Valley Broadcasting. The plaintiffs do not dispute the fact that

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regarding the standard applicable to the First Amendment analysis, as explained hereinafter.

[2] An appeal from that decision is pending in the United States Court of Appeals for the Ninth Circuit.



the stay was provoked by the district court decision, that the stay reduces uncertainty for those broadcasters within the state of Nevada or that the stay preserves FCC resources pending appeal. The plaintiffs do argue that because this stay effectively classifies Nevada broadcasters differently than other broadcasters, the plaintiffs have been denied equal protection of the law. The proposed result: a nationwide stay of enforcement pending the appeal of the Valley Broadcasting decision.

The broadcasters ask for application of a strict scrutiny standard to the FCC's decision because it allegedly intrudes on the fundamental right of free speech. This standard would require a compelling interest be served by the FCC restrictions which cannot be served by an alternative and less burdensome means. However, in Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983), the Fifth Circuit specifically rejected the argument that strict scrutiny applies where commercial speech was involved.

> Furthermore, in all cases commercial speech in entitled to only a limited measure of protection under a different standard of review. Under the Central Hudson Gas test, the state must demonstrate a substantial interest which is directly advanced by the regulation. If the right to advertise for profits were fundamental, then parties to any particular commercial speech regulation could rely on a stricter standard of review -- requiring a compelling state interest and necessary means chosen to attain in -- by locating an unregulated class of

advertisers and insisting on an equal protection analysis by the court.

Id., 718 F.2d at 752. The Fifth Circuit continued: "Hence, unlike other areas of First Amendment protection, the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener." Id. The minimal scrutiny recognized by the Fifth Circuit in commercial speech equal protection cases requires that "the classification challenged need only be rationally related to a legitimate [governmental] interest." Id. 718 F.2d at 753. Without acknowledging Dunigan or this rule, the plaintiffs do alternatively argue that the FCC's stay in Nevada fails even the lesser "rational basis" test.

This Court recognizes the less rational basis standard as applicable to the equal protection challenge made in this matter, and finds that the FCC stay easily meets constitutional muster thereunder. For purposes of the lesser standard, the Court finds that the geographically limited FCC stay was rationally designed to accomplish a legitimate government goal.[3]

In addition, however, the Court finds that the FCC stay survives challenge under the stricter challenge applicable to speech entitled to full First Amendment protection. The allegedly offensive stay and resulting classification were based

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[3] Similarly, the Court finds that the FCC action is not arbitrary, capricious or an abuse of discretion for purposes of review under 5 U.S.C. § 706 (2) (A).



on the order of the district court. Obedience to the orders of the court is surely a compelling interest to all concerned. That obedience is secured by the contempt recognized upon violation. The stay accommodates the broadcasters in the state by providing a measure of certainty of the consequences of any actions. All concerned are spared from the anticipated deluge of individual declaratory actions seeking clarification of the scope of the order which has yet to be declared final.

It is important to note that the stay is temporary in nature and limited in scope. The Nevada district court does not enjoy nationwide jurisdiction; its order is without effect elsewhere. Its order is not final within its jurisdiction until affirmed upon appeal. Yet by virtue of the stay, those within the state of Nevada were served while those persons in all other states, including those states which do outlaw casino gambling, did not have to undergo an unnecessary and perhaps only temporary change of policy. In this regard, it should be noted that the right to unregulated casino advertising was recognized for the first time in Valley Broadcasting. Under the circumstances, the clarity and conservation sought by the government is a compelling interest which could have been accomplished in no other manner that this Court can imagine, and certainly in no other manner suggested by the plaintiffs.

**STATUTORY APPLICATION**

Next, the plaintiffs argue that casino gaming does not fall within the scope of the statute that empowers the FCC to regulate broadcasted advertising of casino gambling. That statute, 18 U.S.C. § 1304, provides in pertinent part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be [guilty of an offense against the United States].

[Emphasis added).[4] Specifically, the plaintiffs argue that this statute does not prohibit advertisement concerning casino gambling because casino games cannot be considered a "lottery, gift enterprise or similar scheme."

This argument has yet to receive judicial recognition, failed before the district court in Valley Broadcasting and fails again here. Those things that fall within the coverage of the statute share three characteristics: (1) the distribution of prizes; (2) according to change; (3) for consideration. F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954). It is clear that all of those characteristics are enjoyed by casino gambling, regardless of the treatment given by any state enactment.

**FIRST AMENDMENT**

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[4] 47 C.F.R. § 73.1211 is a substantially similar rule being challenged in this matter.



The parties have grounded their First Amendment arguments on the Central Hudson analysis traditionally applied to restrictions on commercial speech.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. For purposes of the first factor, there is no dispute here that the proposed speech would concern lawful activity and not be misleading.

Disagreement sharpens on the second prong of the analysis. The FCC contends that the government has a substantial interest (1) in protecting the interest of non lottery states and (2) in reducing participation in gambling and thereby minimizing the social costs associated therewith. The United States Supreme Court summarily recognized these interests in 1993 when it analyzed the right of radio stations in nonlottery states to broadcast lottery information in 1993:

> As to the second Central Hudson factor, we are quite sure that the Government has a substantial interest in

> supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries. As in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), the activity underlying the relevant advertising -- gambling -- implicates no constitutional protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.

United States v. Edge Broadcasting Co., 113 S.Ct. 2703 (1993).[5]

The plaintiffs maintain that the government interests cannot be deemed substantial because the number and nature of the statutorily recognized exceptions to the ban on lottery advertising have any alleged government interest existed "totally eviscerated." However, this argument leaves this Court without authority to disregard the Supreme Court's recent and clear message recognizing the substantiality of the government interests claimed here and in Edge Broadcasting.

The last two Central Hudson factors involve the consideration of the fit between the ends and the means chosen by the government. Edge Broadcasting advises that the third

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[5] It should be noted that the district court in Valley Broadcasting found that the government had a substantial interest in exercising their commerce clause powers in a manner cognizant of state choices with regard to gambling, but refused to continue to acknowledge the traditional link between gambling and vice without the benefit of the guidance offered in Edge Broadcasting.



factor, whether the regulation directly advances the governmental interest asserted, has a broad focus.

> It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is advanced directly as applied to a single person or entity. Even if there were no advancement as applied in that manner -- in this case as applied to Edge -- there would remain the matter of the regulation's general application to others -- in this case, to all other radio and television stations in North Carolina and countrywide.

Edge Broadcasting, 113 S.Ct. at 2704. In Edge Broadcasting, the FCC had adopted a policy which permitted licensed broadcasters located in lottery states to broadcast lottery information while prohibiting those located in nonlottery states from such advertising, despite the interstate reach of the airwaves. Again, the Supreme Court found that the FCC regulation directly served the governmental interest in balancing the interests of the lottery and nonlottery states.

Here, the FCC regulations do not prohibit the broadcast of all information concerning casino gambling in Louisiana and Mississippi. Broadcasted advertisement for the state authorized casinos is abundant. The plaintiffs acknowledge that under certain circumstances it is entirely lawful to broadcast casino advertisements. However, advertisements must pertain to the casino's amenities, such as food and rooms. Advertisements cannot promote the gaming aspect of casinos. For instance, under FCC regulations, the word "casino" may be broadcast in

an advertisement only if made part of the name of the establishment, but information about certain contests at casinos cannot be broadcast.

The plaintiffs, however, promote the argument that because casino advertising is presented in other non-broadcast media to persons in Louisiana and Mississippi, the FCC prohibitions are ineffective. However, it is equally clear that casino advertising is presented in broadcast media as well, albeit subject to the specific FCC rules. To the extent that the plaintiffs are arguing against the more intrusive regulation of broadcasting, this Court is mindful of the latest reaffirmation from the Supreme Court.

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.... In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806-1807. As we said in Red Lion, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id., 395 U.S. at 388, 89 S.Ct. at 1806; (other citations omitted).



> Although Courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence.

Turner Broadcasting System, Inc. v. F.C.C., 114 S.Ct. 2445, 2456-2457 (1994). Given the broad scope of this third Central Hudson factor and the continuing validity of enhanced broadcast regulation, the subject restrictions on the advertisement of casino gambling are materially indistinguishable form those which so directly served the government interest in Edge Broadcasting.

The fourth Central Hudson factor does focus on the application of the restrictions in determining whether the regulation is more extensive than necessary to serve the governmental interest. A reasonable fit is required. This requirement is met if the regulation promotes the government interest "provided that it did not burden substantially more speech than was necessary to further the government's legitimate interest." Edge, 113 S.Ct. at 2705, citing, Ward v. Rock Against Racism, 491 U.S. 781 (1989). The validity of the challenged restriction is measured by the relation it bears to the general problem represented by the government interest, not by the extent to which the prohibitions further that interest in an individual case. Id. This Court easily finds that the regulations governing broadcasted casino advertising have been narrowly constructed for purposes of this last factor.[6]

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[6] In this regard, the plaintiffs' motion to strike paragraph four of Greenberg's declaration relating to the interstate nature of

The plaintiffs argue that each of the subject regulations are a "broad-based, undifferentiating, unrestricted total gag." (Rec. Doc. No. 17, p. 40). However, in light of the prohibitions on casino advertising actually imposed, this characterization is simply not accurate. The fact is that broadcasted casino advertising is permitted, limited by the specific gaming-related limitations now imposed by the FCC. In addition, even if the validity of the restriction was to be measured only as to our broadcasters, the presently imposed restrictions effectively advance the governmental interest in a constitutionally narrow manner.

In effect, the objections to the regulations being made by the plaintiff broadcasters were echoed in Edge Broadcasting and dismissed:

> Nor need we be blind to the practical effect of adopting respondent's view of the level of particularity of analysis appropriate to decide this case. Assuming for the sake of argument that Edge has a valid claim that the statutes violated Central Hudson only as applied to it, the piecemeal approach it advocates would act to vitiate the Government's ability generally to accommodate States with differing policies ... Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting [the nonlottery state's] ban on lotteries would be seriously eroded. We are unwilling to start down that road.

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broadcasting lacks merit.



Edge Broadcasting, 113 S.Ct. at 2701.

In sum, the remaining limitations are reasonably fit to the recognized government interest both in design and in scope for purposes of the Central Hudson evaluation. The remaining restrictions imposed by the FCC are minor and constitutionally valid.

**APPLICABLE STANDARD**

The Court joins the parties in recognizing the application of Central Hudson to the First Amendment analysis herein. It notes that Edge Broadcasting unhesitantly applied that traditional test to the same statute and similar regulations. However, the Fifth Circuit has recently questioned that application in a commercial speech case where content-based restrictions are involved. MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F.3d 492 (5th Cir. 1994). Specifically, the Fifth Circuit referenced R.A.V. v. City of St. Paul, Minnesota, 112 S.Ct. 2538 (1992), as questioning the general application of Central Hudson to all commercial speech cases.

The Court recognizes the fact that R.A.V. preceded Edge Broadcasting an that Edge Broadcasting did not rely on R.A.V.'s analysis at all. That is extremely persuasive evidence that Central Hudson is the correct standard here. However, because of the suggestion in MDII, the Court will seek the further advice or consensus of counsel.

Accordingly,

IT IS ORDERED that the Plaintiffs motion to strike paragraph four of Greenberg's declaration is DENIED.

IT IS FURTHER ORDERED that counsel advise the Court **in writing** no later than November 7, 1994, whether issue exists regarding the standard to be applied to the First Amendment analysis.

New Orleans, Louisiana, this 31 day of October, 1994.

UNITED STATES DISTRICT JUDGE



**MINUTE ENTRY**
**BERRIGAN, J.**
**NOVEMBER 29, 1994**

**GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL**

**VERSUS**

**UNITED STATES OF AMERICA**

**CIVIL ACTION NO. 94-656**
**SECTION "C"**

In its previously-issued Order and Reasons, the Court applied the standard set forth by the United States Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 466 U.S. 557 (1980) to assess the constitutionality of the subject government regulations under the First Amendment. All parties had previously agreed to the application of the Central Hudson to the First Amendment issues presented herein. Although the Court agreed that the Central Hudson standard was appropriate, it asked for supplemental advice from counsel regarding MD II Entertainment, Inc. v. City of Dallas, Texas, 28 F. 3d 492 (5th Cir. 1994), in which the Fifth Circuit questioned the general application of Central Hudson.

Having further considered the issue, the Court maintains that Central Hudson is the appropriate standard. As previously noted, the Supreme Court did not vary application of that standard in United States v. Edge Broadcasting Co., 113

S. Ct. 2703 (1993), which dealt with the same statute at issue here and which was decided after R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992). Contrary to the plaintiffs' suggestion, the opinion of the Supreme Court in Edge Broadcasting cannot be ignored and is considered sound guidance by this Court.

Further, as noted by the defendants in supplemental brief, the Fifth Circuit itself stated in MD II that Central Hudson continues to govern content-neutral regulations of commercial speech. In so doing, it noted Edge Broadcasting and the appropriateness of the application of Central Hudson therein. Again, Edge Broadcasting involved a challenge to the same statute as at issue here. MD II, 28 F. 3d at 495, fn. 14.

Accordingly, and for the reasons previously issued,

IT IS ORDERED that judgment be entered in favor of defendants and against the plaintiffs dismissing the plaintiffs' claims with prejudice, each party to bear its own costs.



**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

**GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INCORPORATED, ET AL**

**VERSUS**

**UNITED STATES OF AMERICA, ET AL**

**CIVIL ACTION NUMBER 94-0656**
**SECTION: "C"**

**JUDGMENT**

The Court having denied the plaintiffs' motion for summary judgment and granted the defendants motion for summary judgment; accordingly,

**IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of defendants, United States of America and Federal Communications Commission and against plaintiffs, Greater New Orleans Broadcasting Association, Incorporated, individually and on behalf of its members, Phase II Broadcasting, Inc., Radio Vanderbilt, Inc., Keymarket of New Orleans, Inc., Professional Broadcasting, Inc., WGNO, Inc. and Burnham Broadcasting Company, a Limited Partnership, dismissing plaintiffs' claims with prejudice, each party to bear its own costs.

New Orleans, Louisiana this 30th day of November, 1994.

UNITED STATES DISTRICT JUDGE



**18 USC § 1304**

**Broadcasting lottery information.** - Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in while or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or al of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

**18 USC § 1305**

**Fishing Contests.** - The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or qualify of fish caught by contestants in any bona fide fishing or recreational event.

## 18 USC § 1307

**Exceptions relating to certain advertisements and other information and to State-conducted lotteries.** - (a) The provisions of Sections 1301, 1302, 1303, and 1304 shall not apply to --

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is --

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is --

(A) conducted by a not-for-profit organization or a governmental organization; or



(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of Sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.

(c) For the purposes of this section "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by change to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that would qualify as tax exempt under Section 501 of the Internal Revenue Code of 1986

## 47 Code of Federal Regulations § 73.1211
## Broadcast of Lottery Information

(a) No licensee of an AM, FM, or television broadcast stations, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning

any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes. (18 U.S.C. 1304, 62 Stat. 763).

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or other thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question. (See 21 FCC 2d 846).

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, lit of prizes or other information concerning:

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. (18 U.S.C. 1307(a); 102 Stat. 3205).



(2) Fishing contests exempted under 18 U.S. Code 1305 (not conducted for profit, *i.e.*, all receipts fully consumed in defraying the actual costs of operation).

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*).

(4) A lottery, gift enterprise or similar scheme, other than one described in paragraph (c)(1) of this section, that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization (18 U.S.C. 1307(a); 102 Stat. 3205); or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (18 U.S.C. 1307(a); 102 Stat. 3205).

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

(2) For purposes of paragraph (c)(4)(i) of this section, the term "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

[40 FR 6210. Feb. 10, 1975, as amended at 45 FR 6401, Jan. 28, 1980; 54 FR 20856, May 15, 1989, 55 FR 18888, May 7, 1990].

(2)



No. 98-387

# In the Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to broadcast advertisements for legal casino gambling.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

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*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) on remand from this Court's decision vacating the original opinion of the court of appeals for reconsideration in light of *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), is reported at 149 F.3d 334. The prior opinion of the court of appeals (Pet. App. 23a-42a) is reported at 69 F.3d 1296. The opinion of the district court (Pet. App. 43a-56a) is reported at 866 F. Supp. 975.

## JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. The petition for a writ of certiorari was filed on September 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case involves a challenge to the constitutionality of 18 U.S.C. 1304, which prohibits the radio or television broadcasting of "any advertisement of * * * any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." In the proceedings below, the Fifth Circuit held that Section 1304 does not violate the First Amendment. The same constitutional question is pending in *Players International, Inc.* v. *United States*, C.A. Nos. 98-5127 and 98-5242 (3d Cir.), and the United States is filing a petition for a writ of certiorari before judgment in *Players* in conjunction with the filing of this brief.

1. Section 1304 is part of a body of federal restrictions on lotteries and related gambling activities that has been maintained by Congress for more than 100 years. In 1868, Congress made it a crime to mail "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. After briefly limiting that mailing prohibition to illegal lotteries, Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302, Congress extended the ban in 1876 to all lotteries and similar gambling enterprises, including ones chartered by state legislatures, Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90. In 1890, Congress extended the mailing prohibition from "letters or circulars" to newspapers, closing a major



loophole in the 1876 statute. Anti-Lottery Act, ch. 908, § 1, 26 Stat. 465. Five years later, Congress moved to eliminate interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate or foreign commerce. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963. With exceptions noted below, those restrictions on interstate lotteries and related gambling activities remain in effect today. See generally 18 U.S.C. 1301 *et seq.*; 39 U.S.C. 3001(a), 3005; *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993).

In *Champion* v. *Ames*, 188 U.S. 321 (1903), the Court held that the 1895 prohibition on interstate transportation of lottery tickets was within the power of Congress under the Commerce Clause. In the course of its opinion, the Court summarized the policies behind the federal lottery statutes. The Court explained that lotteries were regarded by Congress as a "widespread pestilence." *Id.* at 356. Congress "shared the views" that a lottery is uniquely pernicious because it "enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; [and] it plunders the ignorant and simple." *Id.* at 355, 356. In addition, States that had themselves banned lotteries required congressional assistance to deal with the interstate aspects of lotteries. Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Id.* at 357. Thus, Congress intervened both to protect the public against the intrinsic ills associated with lotteries and to reinforce the efforts of anti-lottery States.

In the Communications Act of 1934, Congress added Section 1304 to this body of gambling restrictions. See ch. 652, § 316, 48 Stat. 1088. The Federal Communica-

tions Commission (FCC) subsequently adopted a parallel regulation, which is now codified as 47 C.F.R. 73.1211. Although Section 1304 is a criminal statute, it has not been enforced through criminal proceedings. Instead, the FCC has pursued administrative remedies for violations of its parallel regulation. The FCC can impose a variety of administrative sanctions on licensees for violations of the regulation, including monetary forfeitures and license revocation. See 47 U.S.C. 312(a)(6), 503(b)(1)(D) and (b)(2)(A).

By its terms, Section 1304 is not confined to lotteries but rather applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 290 (1954), this Court construed "lottery, gift enterprise, or similar scheme" to include any undertaking involving: "(1) the distribution of prizes; (2) according to chance; (3) for a consideration." See also *Horner* v. *United States*, 147 U.S. 449, 458 (1893) ("[T]he term *lottery* embraces all schemes for the distribution of prizes by chance * * * and includes various forms of gambling."). In light of *American Broadcasting*, the FCC has consistently treated casino gambling as a form of "lottery, gift enterprise, or similar scheme," because virtually all casino gambling involves "the distribution of prizes" (money), "according to chance," "for a consideration" (the gambler's wager). As indicated below, Congress has likewise understood casino gambling to be covered by Section 1304, and that understanding has not been disputed in this case.

2. In the years since the enactment of Section 1304, Congress has amended the federal gambling statutes on several occasions to permit broadcast advertising of specific types of gambling activities. However, Congress has repeatedly chosen not to lift the ban on broadcast advertising of commercial casino gambling.



a. During the late 1960s and early 1970s, a growing number of States began to conduct lotteries to raise money for government programs. Beginning in 1975, Congress amended the federal gambling statutes to take account of the growth of state-run lotteries. See 18 U.S.C. 1307(a)(1) and (b)(1). Congress sought to strike a balance, allowing the promotion of state-run lotteries within lottery States while simultaneously continuing to discourage participation by residents of non-lottery States. See S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974) (Senate Lottery Report); H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974) (House Lottery Report). To accomplish this, Congress allowed the broadcasting of advertisements for a state-run lottery "by a radio or a television station licensed to a location in that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress also made corresponding changes in the restrictions on lottery-related mail and interstate commerce. 18 U.S.C. 1307(a)(1)(A) and (b)(1).

Although Congress relaxed the restrictions on broadcast advertising of state-run lotteries, it left the federal restrictions on private gambling activities undisturbed. Congress remained "familiar with the kinds of abuses that existed one hundred years ago in the operation of private lottery schemes." Senate Lottery Report, *supra*, at 2. It was willing to relax restrictions on state-run lotteries because "[s]tate lotteries as operated * * * today represent an entirely different situation." *Ibid.* For example, Congress heard testimony that the procedures used by state-run lotteries "operate to hinder organized criminal groups from infiltrating or

stealing from these state lotteries." House Lottery Report, *supra*, at 6.

Although the 1975 legislation permits broadcast advertising of state-run lotteries in States that conduct lotteries, advertising of state-run lotteries remains unlawful in States that do not conduct lotteries. In *Edge Broadcasting*, *supra*, a broadcaster in a non-lottery State challenged the constitutionality of that restriction under the First Amendment. In rejecting that challenge, this Court held that the prohibition of broadcast advertising of state-run lotteries in non-lottery States satisfies the requirements of the First Amendment. 509 U.S. at 425.

b. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988) (Senate Indian Gaming Report). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 12. To accommodate the governmental interests of the nation's Indian tribes, while simultaneously responding to concerns about potential criminal infiltration and other problems, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. 2701 *et seq.*).

As part of Congress's effort to "promot[e] tribal economic development" (25 U.S.C. 2702(1)), the IGRA exempts "any gaming conducted by an Indian tribe pursuant to this [Act]" from Section 1304's restrictions on broadcast advertising, 25 U.S.C. 2720. At the same time, the IGRA substantially tightens government oversight of Indian gambling by subjecting certain types of gambling to direct federal regulation and subjecting other types of gambling to regulatory compacts



between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2713. In addition, the IGRA ensures that the revenues of Indian gambling, unlike those of private casino gambling, are used solely for public purposes. The IGRA requires that net revenues be devoted exclusively to funding tribal governments, local government agencies, and charitable organizations; to promoting tribal economic development; or to providing for the welfare of the tribes and their members. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii) and (d)(2)(A).

c. In 1988, Congress also enacted the Charity Games Advertising Clarification Act, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307(a)). The Act removes federal advertising restrictions on legal lotteries run by charity groups and by "governmental organizations" other than the state-run lotteries already covered by the 1975 legislation. See 18 U.S.C. 1307(a)(2)(A). The Act also lifts advertising restrictions on "occasional and ancillary" promotional lotteries, such as a car dealership drawing for a new car. 18 U.S.C. 1307(a)(2)(B); see 134 Cong. Rec. 31,075 (1988) (Senate Judiciary Committee Report) (giving examples of promotional lotteries).

As originally proposed, the 1988 legislation would have removed advertising restrictions on all gambling allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). However, the House of Representatives adopted an amendment that specifically excluded casino gambling from the bill. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee stated that "no provision of [the bill] is intended to change current law as it applies to

interstate advertising of professional gambling activities." *Id.* at 31,075.

3. a. Petitioners are an association of television and radio broadcasters in New Orleans, Louisiana, and several individual members of the association. The association's member stations wish to broadcast advertisements for Louisiana and Mississippi casino gambling. They commenced this action in February 1994, contending that the application of Section 1304 to broadcast advertising for casino gambling in States where casino gambling is legal violates the First Amendment.

Petitioners' First Amendment challenge is based on the commercial speech principles recognized in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. Under *Central Hudson*, a legislative restriction on commercial speech is subject to a four-part inquiry: (1) whether the speech concerns lawful activity and is not misleading; and if so, (2) whether the asserted governmental interest for the provision is substantial; and if so, (3) whether the provision directly advances the asserted interest; and if so, (4) whether it is no more extensive than is necessary to serve that interest. *Id.* at 566.

Petitioners and the government filed cross-motions for summary judgment regarding the constitutionality of Section 1304. The government identified two distinct interests that are served by Section 1304: first, an interest in minimizing the social and economic costs associated with casino gambling and other kinds of "lottery, gift enterprise, or similar scheme[s]" by reducing public participation in such activities; and second, an interest in assisting States that prohibit or otherwise restrict gambling activities. The government contended that Section 1304 directly advances those interests by reducing public demand for gambling and by



excluding broadcast gambling advertising from non-gambling States. The government further contended that the statutory exceptions to Section 1304 do not affect its constitutionality and that the statute is not impermissibly restrictive.

At the time of the proceedings before the district court, the leading precedent regarding the constitutionality of restrictions on gambling advertising was *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In *Posadas*, this Court sustained the constitutionality of a Puerto Rico statute that prohibited casino gambling advertisements directed at the residents of Puerto Rico. With regard to the second part of the *Central Hudson* test, the Court held that Puerto Rico had a substantial interest in protecting the "health, safety, and welfare of its citizens" by discouraging "[e]xcessive casino gambling." *Id.* at 341. With respect to the third part of the *Central Hudson* test, the Court held that it was "reasonable" for the Puerto Rico legislature to believe that "advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Id.* at 342. The Court held that the statute directly advanced the legislature's goals even though it applied only to casino gambling and not to other forms of gambling. *Id.* at 342-343. Finally, the Court held that the fourth part of the *Central Hudson* test did not require Puerto Rico to resort to alternative regulatory measures, such as anti-gambling "counterspeech," that did not involve restraints on commercial speech. *Id.* at 344.

Because this Court in *Posadas* had endorsed the governmental interests underlying the statute at issue in this case, the government did not present the district court in this case with evidence documenting the

specific social and economic costs of casino gambling. Because *Posadas* (and *Central Hudson* itself) treated the relationship between promotional advertising and consumer demand as axiomatic, the government also did not present evidence regarding the relationship between gambling advertising and demand for gambling. And because *Posadas* attached no constitutional significance to the limited breadth of the Puerto Rico statute or to the existence of regulatory alternatives that did not restrict speech, the government did not present evidence regarding the scope of the statutory exceptions to Section 1304 or the relative efficacy of potential regulatory alternatives. For their part, petitioners also did not proffer evidence on any of those subjects.

b. The district court entered summary judgment in favor of the government, holding that Section 1304 meets the constitutional requirements of *Central Hudson*, and the Fifth Circuit affirmed. See Pet. App. 23a-42a (court of appeals opinion); *id.* at 43a-56a (district court opinion). In April 1996, petitioners filed a petition for a writ of certiorari. *Greater New Orleans Broadcasting Ass'n* v. *United States*, No. 95-1708.

While the petition was pending, this Court issued its decision in *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996). In *44 Liquormart*, the Court held that Rhode Island statutes prohibiting the advertising of retail liquor prices violated the First Amendment. The Court's decision in *44 Liquormart* resulted in four separate opinions, which reflected divergent views regarding the proper contours of the commercial speech doctrine.

Justice Stevens delivered an opinion that was joined to varying degrees by five other Justices but that did



not command a majority for the principal parts of its First Amendment analysis. Justice Stevens proposed replacing the four-part *Central Hudson* test with "rigorous" First Amendment review "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.). Justice Stevens further concluded that the Rhode Island statutes failed to satisfy *Central Hudson* because the evidentiary record did not show that restrictions on price advertising would significantly reduce alcohol consumption and because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal." *Id.* at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.). With respect to *Posadas*, Justice Stevens concluded that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *Id.* at 510 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.). Justice Thomas, writing separately, proposed a more fundamental departure from *Central Hudson* and *Posadas*, under which commercial speech restrictions motivated by an "asserted interest [in] keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace" would be unconstitutional *per se*. *Id.* at 518.

Justice O'Connor, joined by the Chief Justice, Justice Souter, and Justice Breyer, delivered an opinion concurring in the judgment. Justice O'Connor declined Justice Stevens' and Justice Thomas' proposals to abandon the general contours of the *Central Hudson* test.

Instead, Justice O'Connor concluded that the Rhode Island statutes were invalid under *Central Hudson*. Confining her analysis to the fourth part of the *Central Hudson* test, Justice O'Connor agreed with Justice Stevens that Rhode Island's price advertising ban was more extensive than necessary because Rhode Island had "other methods at its disposal," such as taxes, that would "more directly accomplish" the goal of raising prices without any limitation on commercial speech. 517 U.S. at 530. She also agreed with Justice Stevens that *Posadas* had been too deferential in accepting the legislature's judgments about "the effectiveness and reasonableness of [the] speech restriction" in that case and that a "more searching[]" judicial examination of "the relationship between the asserted goal and the speech restriction used to reach that goal" was required. *Id.* at 531. Justice Scalia, writing separately, agreed that the Rhode Island statutes were unconstitutional under *Central Hudson* but suggested that the commercial speech doctrine should be informed chiefly by the historical status of commercial speech at the time of the First and Fourteenth Amendments. *Id.* at 517-518.

c. Because the opinions in *44 Liquormart* collectively reflected an evolution in the Court's commercial speech jurisprudence, and because the opinions disavowed the Court's previously controlling reasoning in *Posadas* in specific respects, the government suggested that the Court remand this case to the Fifth Circuit for further consideration in light of *44 Liquormart*. The Court did so in October 1996. 519 U.S. 801.

On July 30, 1998, the Fifth Circuit issued a new decision that again sustained the constitutionality of Section 1304. Pet. App. 1a-19a. Applying the basic framework of *Central Hudson* as elaborated in *44 Liquormart*, the court held that the governmental interests underlying Section 1304 are substantial, the statute directly advances those interests, and the statute is not impermissibly restrictive. *Id.* at 4a-19a (Jones & Parker, JJ.). Chief Judge Politz dissented. *Id.* at 20a-22a.



With respect to the third component of the *Central Hudson* test, the court reasoned that Section 1304's prohibition on promotional advertising has a more direct and obvious impact on consumer demand than the restriction on price advertising in *44 Liquormart*, which affected demand only indirectly. Pet. App. 8a-9a. The court also found "no doubt" that Section 1304 "reinforces the policy of [S]tates, such as Texas, which do not permit casino gambling." *Id.* at 10a. The court acknowledged that Congress had enacted exceptions to Section 1304, but held that "[t]he government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that the social impact of activities such as state-run lotteries, Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope." *Id.* at 9a-10a.

Turning to the fourth part of the *Central Hudson* test, the court recognized that "[a]fter *44 Liquormart*, * * * the fourth-prong 'reasonable fit' inquiry * * * has become a tougher standard for the [government] to satisfy." Pet. App. 10a. The court held that Section 1304 "cannot be considered broader than necessary to control participation in casino gambling" even under

the more demanding standard of *44 Liquormart*. *Id.* at 16a. The court pointed out that Section 1304, unlike the Rhode Island statutes struck down in *44 Liquormart*, does not ban all forms of advertising; instead, it "targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children," while permitting advertising in newspapers, magazines, and billboards. *Ibid.* The court also pointed out that, although the indirect technique of restricting price advertising that Rhode Island employed in *44 Liquormart* was obviously less effective than direct regulatory means of reducing alcohol consumption, "regulation of promotional advertising directly influences consumer demand," and the effectiveness of non-advertising-related means of discouraging casino gambling is purely speculative. *Id.* at 16a-17a. The court finally noted that petitioners had not identified any "non-speech-related alternatives to [Section] 1304 as a means of assisting anti-gambling [S]tates." *Id.* at 17a.

4. a. In October 1996, shortly after this Court remanded the present case to the Fifth Circuit, an identical First Amendment challenge to Section 1304 was brought in *Players International, Inc.* v. *United States*, C.A. No. 96-cv-4911 (D.N.J.). The plaintiffs in *Players* include the National Association of Broadcasters, a number of state broadcasting associations, two New Jersey radio stations, and several corporations that operate gambling casinos. The plaintiffs in *Players*, like petitioners in this case, asserted that the application of Section 1304 to broadcast advertising for legal commercial casino gambling violates the First Amendment.

The district court proceedings in *Players*, unlike those in this case, took place after this Court's decision



in *44 Liquormart* and other intervening commercial speech decisions, such as *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). As a result, both sides in *Players* had an opportunity to present the district court with evidence responsive to the reasoning of the Court's most recent commercial speech decisions.

The government submitted detailed evidence regarding the economic and social problems, such as compulsive gambling and organized crime, associated with casino gambling and other gambling activities. The government also presented evidence that broadcast advertising is a particularly effective way of stimulating gambling activity and that restrictions on broadcast advertising materially reduce participation in gambling, thereby reducing gambling's attendant social and economic costs. The government presented evidence that private commercial casinos account for a large share of the national gambling market and that, for that and other reasons, the statutory exceptions to Section 1304 do not render the statute ineffective. Finally, the government presented evidence regarding the superiority of advertising restrictions over other regulatory alternatives as a means of limiting compulsive gambling. See C.A. App. 47-441, No. 98-5127 (3d Cir.).

b. In December 1997, the district court in *Players* issued an opinion and order entering summary judgment in favor of the plaintiffs and declaring that Section 1304 and the corresponding FCC regulation violate the plaintiffs' First Amendment rights. 988 F. Supp. 497. The district court denied a subsequent motion by the plaintiffs for the entry of a nationwide injunction, confining the scope of relief to the District of New Jersey. *Players Int'l, Inc.* v. *United States*, C.A. No. 96-cv-4911 (D.N.J. Apr. 1, 1998).

The United States and the FCC filed notices of appeal from the district court's judgment. The government's appeals (C.A. Nos. 98-5127 and 98-5242) have been briefed and are currently awaiting oral argument in the Third Circuit.[1] In conjunction with the filing of this brief, pursuant to 28 U.S.C. 1254(1) and 2101(e), the government is filing a petition for a writ of certiorari before judgment in *Players*.[2]

**ARGUMENT**

The decision of the Fifth Circuit is correct and does not conflict with any decision of this Court. The decision does conflict with the Ninth Circuit's decision in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (1997), cert. denied, 118 S. Ct. 1050 (1998), and, because of that conflict, consideration of the constitutionality of Section 1304 by this Court would be warranted in an appropriate case. This case, however, is not the appropriate vehicle for the Court to take up the constitutional question. Instead, the constitutionality of Section 1304 should be addressed in *Players International, Inc.* v. *United States*, C.A. Nos. 98-5127 and 98-5242 (3d Cir.), which presents the identical constitutional question in the context of a more extensive evidentiary record that was prepared specifically in response to this Court's most recent commercial speech precedents. The Court should deny the petition in this case or, alternatively, hold the petition in abeyance pending the eventual disposition of *Players*.

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[1] The plaintiffs in *Players* have filed a motion to stay further appellate proceedings pending this Court's disposition of the petition in this case. On October 5, 1998, the Third Circuit referred that motion to the merits panel.

[2] We will provide petitioners in this case with a copy of the government's petition in *Players*.



1. "Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). The Court therefore adheres to "a fundamental rule of judicial restraint" that it "will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984); *Parker* v. *County of Los Angeles*, 338 U.S. 327, 333 (1949); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

One corollary to this basic principle of judicial restraint is that review of a statute's constitutionality should not be undertaken until this Court has the benefit of an evidentiary record that is suitable for resolution of the constitutional issue. The Court has long recognized "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions." *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938). "[B]efore * * * questions of constitutional law, both novel and of far-reaching importance, [are] passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" *Borden's Farm Prods. Co.* v. *Baldwin*, 293 U.S. 194, 212 (1934) (quoting *City of Hammond* v. *Schappi Bus Line, Inc.*, 275 U.S. 164, 171-172 (1927) (Brandeis, J.)). Cf. *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 574 (1949) (Frankfurter, J., dissenting) (giving examples of cases remanded "to avoid constitutional adjudication without adequate knowledge of the relevant facts"). When a court passes on the constitutionality of a federal law without a record that adequately illuminates

the constitutional issues, the court risks invalidating a statute that a more complete record would show to be within the constitutional authority of the political branches. In so doing, the court exceeds the proper bounds of "'the role assigned to the judiciary in a tripartite allocation of power.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)).

Here, the limited evidentiary record makes this case an unsuitable vehicle for this Court to resolve the constitutionality of Section 1304. The record in this case was created more than four years ago, long before the Court's most recent commercial speech decisions. At the time that the record was presented to the district court, the continuing authority of this Court's decision in *Posadas* was not in question. Not only did *Posadas* sustain the constitutionality of a similar prohibition on casino gambling advertising, but it did so without requiring an evidentiary showing regarding the costs of casino gambling, the efficacy of the advertising restrictions, or the relative effectiveness of regulatory alternatives. See p. 9, *supra*. The record in this case therefore does not document the social and economic ills associated with casino gambling; it does not contain evidence regarding the connection between broadcast advertising and public demand for gambling activities; it does not contain evidence regarding the practical scope and operation of the statutory exceptions to Section 1304; and it does not address the effectiveness of potential non-speech-related regulatory alternatives.

In contrast to the record in this case, the evidentiary record in *Players* was presented after this Court's decision in *44 Liquormart* and its other intervening commercial speech decisions and was prepared in direct



response to those decisions. As explained above, in *Players*, the government documented the economic and social problems associated with casino gambling and other gambling activities. The government presented evidence regarding the capacity of broadcast advertising to stimulate gambling activity and the corresponding effectiveness of restrictions on broadcast advertising as a means of reducing participation in gambling. The government presented evidence regarding the scope and operation of the statutory exceptions to Section 1304. And the government presented evidence addressing the relative efficacy of advertising restrictions and other regulatory alternatives. See p. 15, *supra*. *Players* thus contains a substantially more illuminating record regarding how Section 1304 works and what it accomplishes.

We do not mean to suggest that the record in the present case is inadequate to support the Fifth Circuit's judgment. To the contrary, under the governing legal principles as we understand them, the Fifth Circuit was correct in holding that Section 1304 does not violate the First Amendment, even on the limited record before it. The government interests underlying Section 1304 are substantial, the statute directly advances those interests, and the statute is not impermissibly restrictive.

The statutory exceptions to Section 1304 do not prevent it from achieving the interests that underlie it. Cf. *Rubin* v. *Coors Brewing Co.*, 514 U.S. at 486 (irrational legislative scheme unable to achieve governmental purposes). The exceptions simply reflect a reasonable congressional judgment that certain kinds of gambling present lesser evils (due to their lesser relative scope and greater regulation) and countervailing social benefits that justify relief from the advertising ban. See Pet. App. 9a-10a. See also *United States* v.

*Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (government need not "make progress on every front before it can make progress on any front").

In addition, Section 1304 is sufficiently tailored to the interests that it advances. See Pet. App. 16a-17a. The statute targets those forms of advertising most likely to stimulate gambling activity and directly suppresses them so as to reduce demand for gambling, particularly gambling fueled by compulsive addiction. Cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (Stevens, J., joined by Kennedy, Souter, & Ginsburg, JJ.) (blanket ban on price advertising is a blunt and indirect instrument for raising liquor prices so as to reduce consumption and is obviously less effective than taxation or setting minimum prices); *id.* at 530 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ.) (same). Moreover, restricting broadcast advertising, which cannot be contained within state boundaries, is the only effective way to assist States that have outlawed casino gambling to shield their residents from advertisements for that activity.

Even though we believe that the record is sufficient to support the constitutionality of Section 1304 under the governing legal principles, this Court should not exercise its discretionary jurisdiction to resolve the constitutionality of Section 1304 on the basis of a limited record that was prepared without the benefit of the Court's most recent commercial speech jurisprudence (and in accordance with then-controlling legal precedent of this Court). That is particularly true when a far more suitable vehicle for review is available. If the Court should determine that our understanding of the governing legal principles is incomplete, the Court may find that facts necessary to the resolution of the constitutionality of Section 1304 were not fully developed because of the then-governing legal standards under which the record in this case was prepared. As the Court observed in another case presenting an important legal issue in the context of a limited factual record:



> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

*Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948); see also *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 668-674 (1994) (remanding for further evidentiary proceedings relating to constitutionality of statute); *Askew* v. *Hargrave*, 401 U.S. 476, 478-479 (1971) (per curiam) (same); *Storer* v. *Brown*, 415 U.S. 724, 738-746 (1974) (same).

2. Because *Players* will offer this Court a more appropriate vehicle than the present case for deciding the constitutionality of Section 1304, the Court should take up that constitutional question in *Players* rather than in this case. The Court therefore should deny the petition in this case or, alternatively, hold the petition in abeyance pending the Court's eventual resolution of the constitutional question in *Players*. If the present petition is denied or held, petitioners will remain free to present this Court with their views regarding the constitutionality of Section 1304 through an *amicus*

filing in *Players*. And if the Court ultimately were to hold that Section 1304 is not constitutional, enforcement of the statute against casino gambling advertisements in casino States would be discontinued on a nationwide basis. As a result, denying this petition or holding it in abeyance will not materially prejudice petitioners (who have sought only prospective relief).

If the Court agrees with us that *Players* provides a preferable setting for resolution of the constitutionality of Section 1304, the remaining question is whether the Court should undertake review in *Players* now or, instead, defer review until after the Third Circuit has issued its decision. In our view, the principles governing this Court's exercise of its certiorari jurisdiction militate in favor of postponing review. Certiorari before judgment ordinarily is reserved for cases in which a compelling need for immediate action by this Court outweighs the benefits to be obtained from the normal appellate process. See Sup. Ct. R. 11. Although resolution of the existing (but narrow) circuit split regarding the constitutionality of Section 1304 is desirable, the constitutional issue does not have the manifest urgency that led the Court to issue certiorari before judgment in such cases as *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *United States* v. *Nixon*, 418 U.S. 683 (1974). At the same time, postponing review until after the Third Circuit has issued its decision would ensure that this Court receives "the benefit [of] permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). Although two courts of appeals have addressed the constitutionality of Section 1304 already, neither court had the opportunity to evaluate the kind of evidentiary record that is before the Third Circuit in *Players*. See Petition for a Writ of



Certiorari at 11 & n.5 in *United States* v. *Valley Broadcasting Co.*, No. 97-1047. The Third Circuit's review of the record, and its evaluation of the First Amendment issue in the context of that record, can be expected to assist this Court in its own eventual deliberations.

Should the Court nevertheless prefer to take up the constitutionality of Section 1304 at this juncture, we are filing a petition for a writ of certiorari before judgment in *Players* to enable the Court to do so on the basis of a more suitable evidentiary record. See 28 U.S.C. 1254(1), 2101(e). Granting the petition in *Players* rather than the petition in this case would ensure that the "delicate duty" of passing on the constitutionality of an Act of Congress (*Walters*, 473 U.S. at 319) is not impeded by limitations in the record before this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the petition should be held in abeyance pending disposition of the petition for a writ of certiorari before judgment in *Players*.

Respectfully submitted.

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NOVEMBER 1998

(3)



No. 98-387

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

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GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

*Petitioners*,

*v.*

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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# REPLY BRIEF FOR THE PETITIONERS

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The Court should grant Broadcasters' petition for a writ of certiorari precisely because there is no evidence in the record to support the Fifth Circuit court's decision in this case. The Fifth Circuit court's support for the government's deliberate decision not to present evidence presents a purely doctrinal issue that the government admits is ripe for review. Further delay will not only cause additional harm to Broadcasters, who have already waited four and a half years for relief, but there is every reason to believe that it will also create more irreconcilable interpretations of commercial speech doctrine among the lower courts.

### *1. This case is the appropriate vehicle for review of the constitutional question presented.*

The government is wrong when it argues in its brief in opposition that the record in this case is "unsuitable" for resolution of the constitutional question presented. Opposition at 17-18. The question presented in this case is a purely doctrinal one: where a commercial speech restriction is fraught with internal inconsistencies and where it is enforced in order to suppress lawful, non-speech conduct, may a court uphold it in the absence of a factual record? The Fifth Circuit court said yes, while the Ninth Circuit court said no. The disagreement between the lower courts affects the fundamental right to speak freely and can only engender greater confusion and conflict in an active area of constitutional law. It cries out for prompt review by this Court.

In its brief before the Fifth Circuit court on remand by this Court, the government cited newspaper and journal articles, along with other sources dealing with compulsive gambling, in an effort to support its advertising ban. The Fifth Circuit court held that the government's materials were unpersuasive. Pet. App. 9a. Yet, it nevertheless upheld the ban. It is that error -- the court's upholding the ban even though it rejected the government's effort to support it -- that creates the doctrinal issue at the root of this case.[1] Despite the clear requirement, set forth in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495 (1996), and its precedents, that courts demand evidence to demonstrate direct and material advancement of governmental interests under the third prong of Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S. Ct. 2343 (1980), some lower courts have continued to hold that the government's speculation

[1] In contrast, the district court in Players International, Inc. v. United States, 988 F. Supp. 497 (D.N.J. 1997), rejected the government's effort to support the ban and then correctly struck the ban down. In its petition for a writ of certiorari in Players ("Players Petition"), the government seeks review of the district court's mechanical application of the third and fourth prongs of Central Hudson, arguing that the district court did not give the government's evidence the weight the government thinks it deserves. Such a dispute does not warrant the exercise of this Court's certiorari jurisdiction, because a resolution of the dispute will provide lower courts with little if any additional guidance regarding commercial speech doctrine. In contrast, the dispute in this case goes to the core of commercial speech doctrine, and addresses a fundamental doctrinal issue in a concise and direct manner.



and unproven assumptions are sufficient to satisfy the third prong. See, e.g., Anheuser-Busch, Inc. v. Schmoke, 101 F. 3d 325 (4th Cir. 1996); Eller Media Company and Outdoor Systems, Inc. v. City of Oakland, 1998 WL 549494 (N.D. Cal. 1998); Rockwood v. City of Burlington, 1998 WL 656397 (D. Vt. 1998); Lindsey v. Tacoma-Pierce County Health Department, 8 F. Supp. 2d 1225 (W.D. Wash. 1998). These courts, like the Fifth Circuit court in this case, have used the presence of multiple opinions in 44 Liquormart as a basis for largely ignoring it and, in the process, effectively reviving the deferential standard of review set forth in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 487 U.S. 328, 106 S. Ct. 2538 (1992). The varied approaches and disparate rulings in the lower courts since 44 Liquormart show the immediate need for further clarification by this Court.

***2. The government had every opportunity to introduce evidence in this proceeding and its failure to do so cannot provide a basis for a denial of Broadcasters' petition.***

The government made a tactical decision not to present evidence when this case was in the district court. The government joined in Broadcasters' request for a remand in light of 44 Liquormart, but instead of taking the opportunity to offer evidence then, the government went back to the Fifth Circuit and worked to convince it that 44 Liquormart didn't matter. The government had ample opportunity to call witnesses or introduce other evidence, but chose not to do so, relying instead on citations to newspaper and journal articles that the court found unpersuasive. For three reasons, the government's decision

not to introduce evidence cannot provide a basis for denial of Broadcasters' petition.

First, 44 Liquormart did not fashion an evidentiary burden where none had existed before. The Court in its commercial speech cases decided both before and after the Louisiana district court granted summary judgment in this case has required the government to bear a heavy evidentiary burden to justify speech restrictions. See Rubin v. Coors Brewing Co., 514 U.S. 476, 489, 115 S. Ct. 1585, 1593 (1995); Florida Bar v. Went For It, Inc., 515 U.S. 618, 626, 115 S. Ct. 2371, 2377 (1995); Ibanez v. Florida Dept. of Business and Professional Regulation, 512 U.S. 136, 146 & n. 10, 114 S. Ct. 2084, 2090 & n.10 (1994); Edenfield v. Fane, 507 U.S. 761, 772-75, 113 S. Ct. 1792, 1801-03 (1993); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 95-96 & n.10, 97 S. Ct. 1646, 1619-20 & n.10 (1977). For three years prior to 44 Liquormart, Broadcasters repeatedly pointed out in the district court, in the Fifth Circuit appeals court and in this Court in their initial petition for a writ of certiorari that the government cannot rely on speculation and conjecture in order to satisfy Central Hudson's third and fourth prongs. 44 Liquormart reiterated and clarified the extent of the government's burden, which had already been firmly established by the Court's prior decisions. 44 Liquormart, 517 U.S. at 504-06, 116 S. Ct. at 1509-10. Under these circumstances, the government cannot credibly claim that it was justified in relying on a record devoid of evidence.[2]

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[2] It is worth noting that, in United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696 (1993), a case



Second, the government's claim that it was surprised by 44 Liquormart is inconsistent with its simultaneous claim that, in essence, 44 Liquormart changed nothing. The government continues to insist, even at this late stage of the proceeding, that 44 Liquormart does not require it to introduce any evidence regarding the efficacy or scope of its ban. Opposition at 19-20; Players Petition at 16. In its brief before the appeals court on remand after 44 Liquormart, the government argued that 44 Liquormart provided no clear precedent and that the court was therefore free to defer to the legislature's decision to promulgate the ban and its abundance of exceptions. The Fifth Circuit panel majority agreed. Pet. App. 10a-12a. Now, when the government states in its opposition that the record in this case is adequate to support the appeals court's decision, Opposition at 19, that statement can only be interpreted to mean that no evidence is needed to support the ban. If this is so, then the government cannot credibly argue that Broadcasters' petition should be denied in order to permit the government to bring more evidence before the Court. The fact is, the Fifth Circuit appeals court is now on record in support of the proposition that the government may suppress lawful non-speech conduct by means of an inconsistent array of speech restrictions without any documented findings concerning the efficacy or scope of its ban. As a consequence, Broadcasters and every citizen in the jurisdiction of the Fifth Circuit court

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heard after Posadas, the government introduced evidence to support an exception to the gaming advertising ban. Clearly, its decision to furnish evidence there, but not here, was a purely tactical one.

have a materially diminished right to speak. The Court should take the opportunity presented by this case to act promptly to correct the Fifth Circuit's serious error.

Third, the government had every opportunity in this proceeding to introduce any evidence it could muster, both before and after 44 Liquormart. If the government truly believed that 44 Liquormart enhanced its burden of proof, then it had an obligation to the court to either ask for a remand to the district court so that it could make an effort to meet that enhanced burden or to join Broadcasters in a request that the Fifth Circuit court reverse its pre-44 Liquormart decision. But, the government did neither. Instead, it went before the appeals court after 44 Liquormart and claimed, as it continues to claim, that the lack of evidence in support of the ban is of no moment. The government made a tactical decision not to introduce any evidence. It prevailed in the Fifth Circuit, with the result that Broadcasters' First Amendment rights have been frozen, and this case has become a dangerous departure from the Court's modern commercial speech cases. The government cannot coherently argue now that, because it declined to place evidence in the record, Broadcasters should not have an opportunity to undo the damage the government caused to Broadcasters' right to speak and to commercial speech doctrine generally.



***3. The Court should grant Broadcasters' petition, in order to avoid the harms that further delay will engender.***

The government characterizes 44 Liquormart as a set of "divergent views" regarding the contours of commercial speech doctrine. Opposition at 10. As Broadcasters have explained in their petition and in this reply, the inconsistent decisions of lower courts since 44 Liquormart show the potential it creates for confusion in those courts. The stark conflict between the Ninth and Fifth circuit courts of appeals is the most salient and important of all of those inconsistent results. In this case, both the majority and the dissenting opinions explicitly relate concerns about the clarity of the current state of commercial speech doctrine. Pet. App. 2a-3a & 20a. The majority opinion used the fragmented nature of 44 Liquormart as an excuse to ignore it. There is every reason to believe that the Court will witness further irreconcilable interpretations among the lower courts in the articulation of commercial speech doctrine, unless the Court acts now to correct the Fifth Circuit court and resolve the deep conflict between it and the Ninth Circuit court.

The time for such corrective action is now. Further delay will cause Broadcasters even greater harm than they have already endured. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). Broadcasters have already waited more than four and a half years for relief from the government's ban. The

interference with their right to speak is even more intolerable, given the fact that broadcasters in many states have such a right, because enforcement of the ban has become a patchwork in light of the deep conflicts between the lower courts. The government admits that this matter is ripe for review. Broadcasters are entitled to a grant of their petition, regardless of the activity in the Third Circuit appeals court.

For the foregoing reasons, Broadcasters respectfully request that their petition for a writ of certiorari be granted and that the Court declare the government's gaming advertising ban to be unconstitutional.

Respectfully submitted,

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November 11, 1998

No. 98-387

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

---

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

*Petitioners*,

*v.*

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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# BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

In this case, the court of appeals upheld a federal ban on the broadcast of advertising concerning lawful casino gaming. The question presented is:

Whether the federal government may, consistent with the First Amendment, undertake to suppress lawful casino gaming by banning truthful, non-misleading broadcast advertising for such gaming.

## INTERESTED PARTIES

Greater New Orleans Broadcasters Association ("GNOBA"), a non-profit corporation with no parent company or non-wholly owned subsidiaries, has filed this document on behalf of its members, which are listed below. Where applicable, this list verifies all parent companies and non-wholly owned subsidiaries of each GNOBA member.

(1) WEZB-FM, WWL-AM,
WLMG-FM/WSMB-AM,
Sinclair Radio of New Orleans, Inc.
1450 Poydras Street
New Orleans, LA 70112

A wholly owned subsidiary of
Sinclair Broadcast Group
2000 West 41st Street
Baltimore, MD 21211

(2) WBOK-AM 1230
Christian Broadcasting Corp.
1639 Gentilly Boulevard
New Orleans, LA 70119

(3) WBYU-AM
KMEZ-FM
WRNO-FM 99.5 FM
Centennial Broadcasting
201 St. Charles Avenue, Suite 201
New Orleans, LA 70130



(4) WCKW-FM 92.3
WCKW-AM 1010
222 Corporation
3501 N. Causeway Blvd., Suite 700
Metairie, LA 70002

(5) WDSU Television, Inc.
WDSU-TV Channel 6
Pulitzer Broadcasting Co.
846 Howard Avenue
New Orleans, LA 70113

A wholly owned subsidiary of
Pulitzer Broadcasting
101 South Hanley
Clayton, MO 63105

A wholly owned subsidiary of
Pulitzer Publishing
900 North Tucker
St. Louis, MO 63101

(6) WGNO, Inc.
#2 Canal Street
New Orleans, LA 70130

A wholly owned subsidiary of
Tribune Broadcasting
435 North Michigan
Chicago, IL 60611

A wholly owned subsidiary of
Tribune Company
435 North Michigan
Chicago, IL 60611

(7) WLTS-FM 105.3
WTKL-FM 95.7
Phase II Communications
3525 N. Causeway Blvd
Suite 1053
Metairie, LA 70002

(8) WNOE-FM 101.1
KKND-RM 106.7
KUMX 104.1
Clear Channel Broadcasting, Inc.
929 Howard Avenue, 2nd Floor
New Orleans, LA 70113

(9) WNOL-TV Channel 38
Quincy Jones Broadcasting, Inc.
1661 Canal Street
New Orleans, LA 70112

(10) WVUE-TV Channel 8
Emmis Television Broadcasting, L.P.
1025 South Jeff Davis Pkwy.
New Orleans, LA 70125



A wholly owned subsidiary of
Emmis Communications Corp.
One Emmis Plaza
40 Monument Circle, Suite 700
Indianapolis, IN 46204

(11) WWL-TV Incorporated
1024 North Rampart
New Orleans, LA 70116

A wholly owned subsidiary of
A. H. Belo Corporation
400 South Record Street
Dallas, TX 75202

WWL-TV/Cox Cable Joint Venture
(A non-wholly owned subsidiary of
WWL-TV Incorporated)
1024 North Rampart
New Orleans, LA 70116

(12) WQUE-FM 93.3
WODT-AM 1280
WYLD-AM/FM
Clear Channel Broadcasting, Inc.
2228 Gravier Street
New Orleans, LA 70119

(13) Viacom Broadcasting of Seattle, Inc.
d/b/a WUPL-TV
3850 North Causeway Blvd., Suite 454
Metairie, LA 70002

A wholly owned subsidiary of
Viacom International, Inc.
1515 Broadway
New York, NY 10036



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## OPINIONS BELOW

The opinions below are reproduced in the Appendix to the Petition for a Writ of Certiorari (Pet. App.). The opinion of the district court (Pet. App. 43a) is reported at 866 F. Supp. 975 (E.D. La. 1994). The original opinion of the court of appeals (Pet. App. 23a) is reported at 69 F.3d 1296 (5th Cir. 1995). This Court vacated that opinion on October 7, 1996 and remanded the matter for further consideration in light of *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996). *Greater New Orleans Broadcasting Association v. United States*, 117 S. Ct. 39 (1996). The opinion of the court of appeals on remand (Pet. App. 1a) is reported at 149 F. 3d 334 (5th Cir.1998).

## JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. Broadcasters timely filed a petition for a writ of certiorari with the Court on September 2, 1998, and the Court granted the petition on January 15, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Federal criminal statute 18 U.S.C. § 1304 (Pet. App. 61a) and Federal Communications Commission ("FCC") regulation, 47 C.F.R. § 73.1211 (Pet. App. 63a), authorize criminal prosecution and administrative sanctions for the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance . . . ."

## STATEMENT OF THE CASE

### *1. Preliminary statement.*

In its decision on remand from this Court, the Court of Appeals for the Fifth Circuit upheld the federal government's ban on the broadcast of truthful, nonmisleading advertising of legal casino gaming. The ban is an insupportable suppression of Broadcasters' right to speak freely and truthfully about a lawful commercial activity. In upholding it, the Fifth Circuit court strayed from the guidance this Court's commercial speech cases provide and established a precedent that can only engender further erosion of the First Amendment's guarantee of free speech. Furthermore, the Fifth Circuit court's decision created a fundamental



and irreconcilable conflict with the decision of the Court of Appeals for the Ninth Circuit in *Valley Broadcasting Co. v. United States*, 107 F. 3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998). That court held that the same advertising ban violated the First Amendment, as did the United States District Court for the District of New Jersey in *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997). Accordingly, Broadcasters respectfully submit that the Court should reverse the judgment of the Fifth Circuit court and declare the Government's ban to be a violation of the First Amendment.

### *2. The Government's advertising ban.*

The Greater New Orleans Broadcasters Association ("GNOBA") is a non-profit trade association representing member television and radio stations in the New Orleans, Louisiana area in matters affecting the broadcast industry. The remaining petitioners are several GNOBA members (the petitioners are hereinafter collectively referred to as "Broadcasters").

Federal law prohibits Broadcasters from airing advertising for lawful casino gaming, including lawful casino gaming conducted in Louisiana and Mississippi pursuant to detailed state regulatory regimes. The federal ban on broadcast advertising for casino gaming is contained in federal criminal statute 18 U.S.C. § 1304 (Pet. App. 61a) and its corresponding Federal Communications Commission ("FCC" or

"Commission") regulation, 47 C.F.R. § 73.1211 (Pet. App. 63a), which Congress enacted as section 316 of the Communications Act of 1934 (the respondents, FCC and United States of America, are hereinafter collectively referred to as the "Government"). The Government may impose monetary forfeitures, broadcast license revocation, criminal fines and imprisonment of up to one year against radio and television broadcasters that violate its ban.

In its present form, the ban is but a wisp of what Congress originally enacted -- a blanket prohibition on broadcast lottery advertising. What remains of that prohibition is a punitive regulatory scheme, undermined by a hodgepodge of congressionally-mandated exceptions. Those exceptions gut any remaining vestiges of the ban's purpose and any constitutional validity it might have had, by permitting, and indeed encouraging, what the original regulatory scheme explicitly forbade, namely the broadcast of lottery advertising.

Passage of these exceptions has paralleled a substantial, nationwide increase in governmental tolerance and encouragement of all forms of legalized gaming. In 1975, Congress exempted advertising of state-conducted lotteries by stations licensed in states permitting such lotteries. 18 U.S.C. § 1307(a)(1) (Pet. App. 62). Congress passed this exception so that state-conducted lotteries would flourish, and indeed they have; today, thirty-seven states and the District of Columbia sponsor lotteries. In 1988, the Government



decided to permit American Indian tribes to operate casinos and to encourage broadcast advertising for gaming at those casinos pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*; 47 C.F.R. § 73.1211(c)(3) (Pet. App. 64a). Today, casino gaming is conducted by American Indian tribes in more than thirty-three states.

Congress has carved out another exception permitting broadcast advertising of gaming sponsored by non-profit or governmental entities for charitable purposes. 18 U.S.C. 1307(a)(2)(A) (1988) (Pet. App. 62a); 47 C.F.R. § 73.1211(c)(4) (Pet. App. 65a). Fishing contests, sporting events or contests, and occasional and ancillary lotteries conducted by commercial organizations other than casinos all constitute full-blown lotteries under the Government's interpretation of its ban, but broadcasting advertising for those forms of gaming is also permitted under exceptions to the ban. 18 U.S.C. § 1305 (1950); 1307(d) (1988); 1307(a)(2)(B) (1988) (Pet. App. 61a-63a); 47 C.F.R. § 73.1211 (Pet. App. 63a). Gaming in all of its forms, along with Government-sanctioned broadcasts promoting it, are now part of mainstream America. Some form of legalized gaming is allowed today in forty-seven states. Private, non-Indian casino gaming is legal in twenty-two states.

### *3. Decisions of the lower courts.*

On February 25, 1994 in the District Court for the Eastern District of Louisiana, Broadcasters challenged the constitutionality of § 1304 and § 73.1211, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1331. In opposing the action, the Government filed a cross-motion for summary judgment without submitting any evidence to justify the scope or demonstrate the effectiveness of its ban. Responding to the parties' cross-motions for summary judgment, the district court entered a summary judgment in favor of the Government on November 30, 1994. Pet. App. 59a. Broadcasters timely appealed to the Court of Appeals for the Fifth Circuit, and in a two-to-one decision an appeals court panel affirmed the district court's judgment. Pet. App. 23a. Broadcasters sought review by this Court, which, on October 7, 1996, vacated the decision of the Fifth Circuit court and remanded the case for reconsideration in light of *44 Liquormart*, which the Court had decided after the Fifth Circuit court's original decision. On July 30, 1998, the same panel once again affirmed the judgment of the district court in a two-to-one decision. Broadcasters again sought review by this Court, which granted Broadcasters' petition for a writ of certiorari on January 15, 1999.

When it first reviewed the Government's ban, the majority of the appeals court panel recited the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980), but the panel majority did not require that the



Government justify the ban with evidence.[1] In its first petition for certiorari to this Court, Broadcasters criticized the panel majority's failure to require proof of the ban's effectiveness and narrow scope. While that petition was pending, the Court decided *44 Liquormart*, which substantially clarified the Government's burden of proof. Shortly thereafter, the Court granted Broadcasters' petition and instructed the Fifth Circuit court to revisit the matter.

On remand, the appeals court instructed the parties to file supplemental briefs concerning the effect of *44 Liquormart* on the legitimacy of the Government's advertising ban. In its brief, the Government conceded that it was required to furnish evidence to support the ban and cited a mishmash of non-legal sources for a brand new contention -- that the ban effectively

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[1] *Central Hudson* provides that:

> For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S. Ct. at 2351. The parties have never disputed that the advertising at issue concerns a lawful activity and is truthful and non-misleading.

suppressed compulsive gambling. But, none of the material the Government cited suggested a causal connection between broadcast advertising for gaming and compulsive gambling. Indeed, in its opinion on remand, the panel majority itself correctly found that the Government's revamped effort to support the ban "suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos." Pet. App. 13a. But in spite of this finding, the panel majority then proceeded to do exactly what the Government attempted -- on its own notice it cited more unsubstantiated hearsay from newspaper columnists, politicians and other non-legal sources, absolutely none of which even referred to, much less proved anything about, the advertising ban *sub judice*. Pet. App. 11a, n. 9; 12a-13a, n. 10; 14a, n. 11; 15a, n. 12.

In addition, the panel majority repeatedly voiced its dissatisfaction with *44 Liquormart*, claiming that fragmentation of the Court in the case left the lower courts without direction. Instead, the panel majority relied on the Court's earlier decisions in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 487 U.S. 328, 106 S. Ct. 2968 (1986) and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696 (1993) to uphold the Government's ban.

As he did in his original opinion in this case, Chief Judge Politz dissented. He stated that "the stricter standard employed by the Supreme Court in *44 Liquormart* only strengthens my convictions," by



making it even more apparent that the ban is unconstitutional. He further stated:

> Read together, the opinions in *44 Liquormart* teach that the government must use direct methods of controlling disfavored behavior. This, combined with the heavy burden of proof that is now placed on the government, substantially undercuts the validity of laws, such as the statute at issue here, which restrict nondeceptive commercial information.

Pet. App. 21a. And, he concluded that:

> If not so viewed previously, it must now be recognized that the statutory advertising proscription at bar herein simply fails to advance directly the government's asserted interests. . . . The numerous exceptions and inconsistencies contained in the publication ban abundantly undermine and are adverse to the asserted government interests, precluding the material advancement thereof. In addition, given the many exceptions, the government has totally failed to meet its burden of proving that a nationwide ban is mandated.

Pet. App. 21a-22a.

## SUMMARY OF THE ARGUMENT

Truthful, non-misleading advertising has been specifically entitled to First Amendment protection since 1976, when the Court held that it is "indispensable" to the preservation of our free enterprise economy. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S. Ct. 1817, 1827 (1976). If truthful, non-misleading advertising may be restricted at all, the government must prove -- with convincing evidence presented in court -- that its restriction satisfies the four-part test the Court set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980). That test prohibits suppression of truthful, non-misleading advertising for lawful goods and services unless the government demonstrates that such suppression directly and materially advances a substantial governmental interest and is no more extensive than necessary to so advance that interest.

The parties do not dispute that the Government's advertising ban prohibits broadcast of truthful, nonmisleading advertising for a lawful commercial activity and thus satisfies the first part of the *Central Hudson* test. However, the remaining three parts of the test are at issue. This Court's commercial speech cases make it clear that under *Central Hudson* the Government carries a heavy burden to prove that it has (2) a substantial interest (3) that is directly and materially advanced by a ban (4) that is no more extensive than



necessary. The Court has made it clear again and again that the Government may not rely on speculation or conjecture to meet its heavy burden of proof; it must adduce facts in court to satisfy each of these last three parts of *Central Hudson*.

The Government has never succeeded in identifying a substantial federal interest that is served by its ban. The Government originally asserted that its ban was imposed to address two interests: an interest in suppressing public participation in gaming and an interest in "backstopping" the policies of the few states that have not yet legalized gaming. But, there is no evidence in the record to support a contention that either of these interests is substantial. In fact, more than forty-seven states have determined that regulated gaming has benefits that outweigh any costs it imposes and have therefore legalized gaming. Furthermore, this Court's prior cases lend no support at all to the Government's assertion. Indeed, this Court has specifically recognized a federal interest in accommodating state policies concerning gaming -- an interest that the Government's ban tramples underfoot. After two and a half years of litigation, the Government suddenly decided that its ban was intended to serve another interest: an interest in reducing the incidence of compulsive gambling. But, the Government's latest tactic is not only procedurally inappropriate, it is also ineffective, because the Government has not provided one scintilla of evidence connecting broadcast advertising of casino gaming and compulsive gambling. Thus, the Government's ban fails *Central Hudson*'s second part.

The Government's ban also fails *Central Hudson*'s third part, because the Government cannot provide any convincing evidence that its advertising ban advances any of the interests it asserts, much less that the ban *directly and materially* advances those interests. And, it is inconceivable that such evidence could exist, because the ban is so fraught with internal inconsistencies that it simply cannot shield the general public or compulsive gamblers from information regarding casino gaming. In fact, the federal scheme encourages Broadcasters to air advertising of gaming conducted at casinos operated by American Indian tribes, as well as advertising of other forms of gaming.

Finally, the Government's advertising ban fails *Central Hudson*'s fourth part, because the ban is more extensive than necessary to serve the Government's asserted interests. Not only has the Government failed to introduce evidence necessary to meet its burden of proving "narrow tailoring," but the Government has failed to address the abundance of nonspeech regulatory means that could easily serve the Government's asserted interests.

The Government's advertising ban fails each and every part of the *Central Hudson* test. The Fifth Circuit court's application of the *Central Hudson* analysis to uphold the Government's advertising ban cannot be reconciled with the guidance this Court's commercial speech cases provide. Accordingly, Broadcasters respectfully request that the Court reverse the appeals



court and declare that the Government's advertising ban violates the First Amendment.

## ARGUMENT

The decision of the appeals court fails to adhere to the requirement -- articulated repeatedly in the Court's jurisprudence -- that lower courts engage in an independent and searching judicial inquiry when evaluating restrictions on speech protected by the First Amendment. As a result, Broadcasters' truthful, non-misleading advertising has been banned from the airwaves based upon nothing more than an unfounded and paternalistic legislative preference for keeping citizens ignorant of certain legal gaming activities.

### I. Under this Court's precedents, the Government must introduce evidence in support of its restrictions on commercial speech, and before a court may uphold such restrictions, it must carefully scrutinize that evidence and find it convincing.

In the commercial marketplace, the general rule is that the speaker and the audience, not the government, assess the value of information presented. *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S. Ct. 1792, 1798 (1993). The critical importance of this rule in a free society has led the Supreme Court to require that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n. 20, 103 S. Ct. 2875, 2883, n. 20 (1983). Thus, the heart of a court's

role in evaluating a governmental restriction on truthful commercial speech is to determine whether the facts in the record justify the restriction. Courts must subject such speech restrictions to the probing scrutiny mandated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980):

> For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Unquestioning deference to legislative action is inconsistent with the careful scrutiny *Central Hudson* demands, and such deference finds very little support in this Court's cases interpreting the First Amendment. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 1543 (1978). The requirement that courts engage in an independent and searching examination of any asserted basis for suppression of truthful commercial speech is vital, because, as this Court has stated, without such scrutiny, the government could "with ease restrict commercial speech in the



service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S. Ct. 1585, 1592 (1995), *quoting Edenfield*, 507 U.S. at 770, 113 S. Ct. at 1800. This established and fundamental principle is not altered when a court is confronted with suppression of commercial speech concerning activities that are purported to be "socially harmful." *Rubin*, 514 U.S. at 482, n.2, 115 S. Ct. at 1589, n.2. Simply put, in every case such as this one, a court must bring to bear its "independent judgment" of the evidence presented. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 155, 129, 109 S. Ct. 2829, 2838 (1989).

The Court's recent treatment of commercial speech doctrine in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996), reaffirms the substantial burden the government must bear when it undertakes to suppress truthful, non-misleading advertising for lawful activities. In *44 Liquormart*, the Court considered a challenge by liquor stores to a Rhode Island statute that forbade advertisements for liquor that contained price information. The state defended the statute as a means of promoting temperance. All nine justices agreed that the ban violated the First Amendment. In the principal opinion, Justice Stevens wrote that "[a] commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *44 Liquormart*, 517 U.S. at 505, 116 S. Ct. at 1509 (citing *Central Hudson*, 447 U.S. at 564, 100 S. Ct. at 2350). Rejecting Rhode Island's arguments concerning the efficacy of its speech restrictions, Justice Stevens stated that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the

price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* He refused to engage in "the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the state takes aim at accurate commercial information for paternalistic ends." *Id.*, 517 U.S. at 507, 116 S. Ct. at 1510 (citations omitted).

Similarly, in her concurring opinion Justice O'Connor stated,

> Since *Posadas*, . . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny . . .. In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.



*Id.*, 517 U.S. at 531-32, 116 S. Ct. at 1522 (citations omitted).

Justice Thomas went even further in his criticism of paternalistic suppression of commercial speech, stating,

> In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied, in my view. Further, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.

*Id.*, 517 U.S. at 518, 116 S. Ct. 1516 (Thomas, J., concurring).

Thus, the pronouncements of the Court are clear and consistent: lower courts must engage in an independent and searching judicial inquiry when evaluating commercial speech restrictions imposed by the government, and can only uphold such bans where the government demonstrates in court with convincing evidence that they directly and materially advance a substantial governmental interest and are no more extensive than necessary in order to do so.[2]

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[2] The Fifth Circuit court mistakenly analogized the Government's ban to a "time, place and manner" restriction. Pet. App. 16a. But, the ban cannot possibly meet this Court's

## II. The Government's ban cannot survive the probing scrutiny that *Central Hudson* requires.

In this case, the parties do not dispute that the advertising in question is both truthful and nonmisleading and that it involves commercial activity that is lawful. *Cf. United States v. Edge Broadcasting Company*, 509 U.S. 418, 113 S. Ct. 2696 (1993) (upholding an advertising ban applied to broadcasters licensed to communities where the advertised activity was illegal). Thus, there is no question that the first part of the *Central Hudson* test is satisfied.

### A. The Government failed to identify a substantial federal interest in banning broadcast advertising for lawful casino gaming.

*Central Hudson* next required the appeals court to "examine . . . searchingly the State's professed goal" to determine whether it constitutes a substantial governmental interest. *44 Liquormart*, 517 U.S. at 531, 116 S. Ct. at 1522 (O'Connor, J., concurring). But, the appeals court glossed over this second part of the *Central Hudson* analysis in a single sentence, citing to the Court's conclusion in *Posadas* that the Puerto Rico legislature had a substantial interest in protecting the health, safety and welfare of its citizens. Pet. App. 4a.

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requirement that "time, place and manner" restrictions be content-neutral, in light of the fact that the ban expressly applies to speech with a specific content -- casino gaming advertising. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29, 113 S. Ct. 1505, 1516-17 (1993). The court did not state whether its mischaracterization of the ban affected the level of scrutiny it applied in reviewing it.



The defect in the approach of the appeals court lies in the fact that *Posadas* merely affirmed an interest of the *states*, not an interest of the federal government. As this brief has already shown, the states have actively examined the effects of legal gaming on their citizens and the vast majority of them have determined that, on balance, legalized and regulated gaming is beneficial. *See supra* at 4-5. In fact, the only *federal* interest identified by the Court in *Posadas* was the same one the Court identified in *Edge*, namely an interest in balancing the various policies of the states concerning gaming, and that interest is sacrificed by the Government's enforcement of its nationwide ban. In addition, the appeals court failed to give proper weight to the wholly inconsistent nature of the Government's approach to regulating gaming, which should have precluded a finding by the court that the Government has a substantial interest in suppressing legal gaming. Although the Government prohibits broadcast advertising for private casino gaming, it permits broadcast advertising for casino gaming conducted by American Indian tribes, as well as other types of gaming. Indeed, the Government encourages casino gaming itself, where it is conducted at casinos operated by American Indian tribes, and does so notwithstanding objections from the states where some of the casinos are located. Thus, there is no jurisprudential or legislative support for the Government's contention that it has a substantial interest in nationwide suppression of speech concerning legal gaming.

In addition, the Government's sudden decision to divert the appeals court's attention away from overall public participation in legal gaming and to focus it instead on compulsive gambling calls into question the

legitimacy of the Government's earlier asserted interests. Throughout the more than two and a half years of litigation prior to its supplemental brief on remand by this Court, the Government consistently asserted that its casino advertising ban was designed to generally suppress all public participation in gaming and to "backstop" the policies of the few states that prohibit gaming. In its supplemental brief on remand, the Government grudgingly acknowledged that it was questionable whether the "host of social and economic problems" that it claimed resulted from gaming could be effectively addressed by the ban, stating that, "with respect to some of those problems, such as organized crime, the relative effectiveness of advertising restrictions and non-speech regulatory alternatives may be open to debate." Supplemental Brief for the Appellees at 11. Accordingly, at the eleventh hour, the Government attempted to create a new, more narrow federal interest -- one that addresses only compulsive gambling. This new *post hoc* justification for the ban conflicts with the earlier claim by the Government in *Edge* that it has an interest in balancing the various policies of the states, which have traditionally regulated gaming. *See infra* at 27. Still, the appeals court accepted the Government's contention that its initial broadly stated interests were substantial and seemed to accept, without any evidence or, indeed, any analysis by the Government that the Government's discussion of compulsive gambling provided an illustration of the substantiality of the Government's initial asserted interests.

The appeals court's superficial treatment of *Central Hudson*'s second part cannot be reconciled with this Court's requirement that courts carefully examine



evidence concerning the substantiality of the Government's asserted interests. The Government's *post hoc* adoption of shifting interests illustrates the fact that, in reality, there is no substantial federal interest addressed by the Government's ban. Accordingly, the Court should declare the ban to be a violation of the First Amendment.[3]

**B. The Government's ban does not directly and materially advance its asserted interests and is not narrowly tailored to do so.**

After brushing aside the second part of the *Central Hudson* analysis, the decision of the appeals court focused more intently on the application of the third and fourth parts of *Central Hudson*. The panel majority opined that "after *44 Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear." Pet. App. 7a. The panel majority seemed to say that, because it believed that *44 Liquormart* was unclear in some respects, the court was free to adopt the legal standard it preferred, namely a

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[3] The Government never explained, and the appeals court never required it to explain, how to mesh its earlier asserted interests in generally suppressing public participation in gaming and supporting the policies of non-gaming states with its later asserted interest in reducing compulsive gambling, even though it is obvious that these asserted interests are not coextensive. It is likely that a ban narrowly tailored to materially advance an interest in reducing compulsive gambling would be much more narrow than a ban intended to broadly suppress public participation in gaming and both would be different from a ban intended to defend the interests of non-gaming states (interests that could vary from state to state).

*Posadas*-inspired exception to *Central Hudson* permitting wholesale advertising restrictions where such advertising concerns so-called vice activities.

The manifest error in this approach lies in the fact that after *44 Liquormart* there is no lack of clarity regarding the invalidity of *Posadas*. Justice Stevens, writing in *44 Liquormart* on behalf of four justices, stated that "*Posadas* erroneously performed the First Amendment analysis" and that the Government "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *44 Liquormart*, 517 U.S. at 509-10, 116 S. Ct. 1511. In her concurrence, and on behalf of an additional four justices, Justice O'Connor stated that the evolution of commercial speech doctrine since *Posadas* requires courts reviewing commercial speech restrictions to take a "closer look" at the government's proffered justification for such restrictions and "examine[] more searchingly" the government's assertions that the restrictions further the government's interest and are no more extensive than necessary to serve that interest. *Id.*, 517 U.S. at 531-32, 116 S. Ct. at 1522 (citations omitted).

Thus, insofar as deference to legislative judgment is concerned, *44 Liquormart* could not be more clear. Courts may no longer exercise the deference to what the legislature believes to be reasonable that the Court permitted in *Posadas*, and the Government must prove -- with convincing evidence presented in a court of law -- that its commercial speech bans directly and materially advance substantial governmental interests and are narrowly tailored to do so. But, rather than take the



"closer look" that Justice O'Connor discussed, the panel majority clung tightly to *Posadas*, citing that case no fewer than nine times.

**1. The Government's casino advertising ban cannot directly advance its asserted interests in a material way, and therefore fails the third part of the *Central Hudson* test.**

**a. The Government failed to carry its burden of proving that the ban directly and materially serves the interests the Government asserts.**

*Central Hudson*'s third part requires that the Government furnish convincing evidence showing that its ban is effective. The Government cannot meet its burden under the third part of *Central Hudson* by relying on "speculation and conjecture." *Rubin*, 514 U.S. at 487, 115 S. Ct. at 1592 (quoting *Edenfield*, 507 U.S. at 770, 113 S. Ct. at 1800). "Such speculation certainly does not suffice when the state takes aim at accurate commercial information for paternalistic ends." *44 Liquormart*, 517 U.S. at 507, 116 S. Ct. at 1510 (Stevens, J.).

But, in this case the Government did not present, and the appeals court did not require, evidence showing that its ban directly and materially advances the Government's asserted interests. The panel majority correctly held that the Government's last-minute treatment of compulsive gambling was not only procedurally inappropriate, but it was also unavailing, because it failed to establish any connection between broadcast advertising for casino gaming and compulsive gambling. Pet. App. 11a-13a. But, notwithstanding this

finding, the panel majority went on to state that the Government had no burden "to establish a direct, quantitative evidentiary link" between broadcast advertising of casino gaming and compulsive gambling -- a view that undercuts the "direct and material advancement" requirement of *Central Hudson* and cannot possibly satisfy the requirement that courts rule out "speculation and conjecture" and take a "closer look" at the evidence furnished by the government in support of its speech restrictions. The panel majority then proceeded to introduce its own research and argumentation regarding compulsive gambling. Pet. App. 11a, n. 9; 12a-13a, n. 10; 14a, n.11; 15a, n.12. Its citations, like the Government's, did not even refer to, much less establish, the required causal link between broadcast advertising for private, state-regulated casino gaming and compulsive gambling. Thus, the panel majority's citations could not amount to the convincing evidence of direct and material advancement that this Court requires where the government deprives its citizens of the right to speak and hear about certain lawful activities.

In essence, the appeals court upheld the Government's ban based solely on a presumption that the ban served the interests the Government asserted. The appeals court based its mistaken belief that the Government had no burden to furnish evidence under *Central Hudson*'s third part on an erroneous conclusion that "*44 Liquormart* does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised." Pet. App. 8a. But, where advertising for a product is suppressed, "without any finding of fact, or indeed any



evidentiary support whatsoever, we cannot agree with the assertion that the . . . advertising ban will *significantly* advance the State's interest . . .." *44 Liquormart*, 517 U.S. at 505, 116 S. Ct. at 1509 (Stevens, J.) (emphasis supplied); *see also Rubin*, 514 U.S. at 487-88, 115 S. Ct. at 1592; *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2153 (1997) (Souter, J., dissenting). Thus, the panel majority improperly relied upon "speculation or conjecture" regarding the efficacy of the Government's advertising ban.

In addition, the panel majority incorrectly relied upon Posadas, precisely as it had in its pre-*44 Liquormart* opinion, for the proposition that proof that the Government's ban directly advances the Government's interests was "evident from the casinos' vigorous pursuit of litigation to overturn it." Pet. App. 32a (original opinion) and 10a (opinion on remand). But *44 Liquormart* explicitly prohibited such reasoning. In that case, Justice Stevens stated that the mere fact that the plaintiffs challenged a speech restriction in no way provided evidence of the restriction's effectiveness. *44 Liquormart*, 517 U.S. at 506, n.16; 116 S. Ct. at 1510, n. 16. Relying on *Posadas* instead of *44 Liquormart*, the panel majority eviscerated the third part of the *Central Hudson* test, by holding that the Government automatically satisfied *Central Hudson*'s third part the moment Broadcasters filed a lawsuit to vindicate their rights under the First Amendment.[4]

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[4] Furthermore, the panel majority's reasoning ignored the important fact that, in this case, it is not casinos that challenged the ban, it is Broadcasters, who must compete with other media that are permitted to publish

**b. The irrationality of the Government's ban prevents it from directly and materially advancing the interests the Government asserts.**

The panel majority's presumption that the Government's ban materially reduces public participation in gaming is particularly unjustified, because there is "little chance that [censoring broadcast advertising of lawful casino gaming] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Rubin*, 514 U.S. at 489, 115 S. Ct. at 1593. The Government's advertising ban is an irrational hodgepodge of conflicting exceptions concerning who may speak, what they may say, and what medium they may use. Therefore, even assuming, purely for the sake of argument, that the general public or compulsive gamblers are susceptible to broadcast advertising, the Government's ban is conspicuously ill-suited to shielding them from it. Broadcasters are free to air advertisements that feature gaming conducted on Indian reservations in more than thirty-three states and are permitted to broadcast advertisements that feature parimutuel betting and other sports betting (*see* Report and Order in MM Docket 83-842, *In the Matter of Elimination of Unnecessary Broadcast* Regulation, 56 Rad. Reg. 2d (P&F) 976, 49 Fed. Reg. 33,264 (1984)), as well as state-operated lotteries. *See* 47 C.F.R. § 73.1211(c)(1) (Pet. App. 64a). Broadcasters in any state may air advertisements that use the word "casino" where it is part of the advertiser's name, as well as advertisements that convey the atmosphere of casinos

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advertising of gaming at private casinos.



and tout the "non-stop Vegas-style excitement" available at casinos. Memorandum Opinion and Order, *In re WTMJ, Inc.*, 8 FCC Rcd. 4354 (Mass Media Bureau 1995). Permissible advertisements for casinos routinely feature images of enthralled casino patrons, as well as flashing lights and other elements of casino decor "that combine to create the ambiance popularly associated with Las Vegas establishments." *Id.* Thus, the Government's ban cannot reasonably be expected to materially advance its asserted interests.

Both in *Valley Broadcasting* and in *Players International*, courts reviewing the legitimacy of the Government's ban in the wake of *44 Liquormart* found that the ban failed the third part of the *Central Hudson* inquiry. Those courts concluded that the ban's conflicting exceptions so completely undercut its effectiveness that it cannot directly and materially advance the Government's asserted interests. However, in this case the panel majority did not even acknowledge the existence of *Players International*, and it quickly brushed aside the conflicting decision of the appeals court in *Valley Broadcasting* by simply concluding that the Ninth Circuit court relied on an incorrect reading of *Rubin* when it found that the myriad of inconsistent exceptions to the ban prevented it from materially advancing the Government's asserted interests. Yet, the reasoning of the Ninth Circuit court was as logical as it was succinct: "because [the Government's ban] permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries." *Valley*

*Broadcasting*, 107 F. 3d at 1335.[5] Instead of considering the logic of the Ninth Circuit court and the guidance it provided, the panel majority here simply reiterated its pre-*44 Liquormart* view that, in enacting the ban, the Government made "legitimate, quintessentially legislative choices" that the panel majority would neither review nor disturb. Pet. App. 33a (original opinion) and 9a (opinion on remand).

The panel majority attempted to make much of selected dicta in *Edge*. Pet. App. 2a-3a and 17a. There, the Court said that Congress might not have been compelled by the First Amendment to create the exception to the gaming advertising ban that permits broadcasters located in states that operate lotteries to advertise any state-sponsored lottery. *Edge*, 509 U.S. at 428, 113 S. Ct. at 2704. But the fact is, Congress did create this and numerous other exceptions and, in so doing, undercut whatever integrity the advertising ban may have ever had. In addition, unlike the statute the Court reviewed in *44 Liquormart* and unlike the statute under review here, the state lottery exception the Court considered in *Edge* was designed to bar advertising only in states where the advertised activity was illegal. Thus, *Edge* may continue to be a valid precedent after *44 Liquormart*, but only because the advertising at issue in *Edge* proposed a transaction that was illegal in the state where it was broadcast. *44 Liquormart*, 517 U.S. at 509,

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[5] The New Jersey district court in *Players International* similarly concluded, "the underlying governmental policy, banning nonmisleading commercial messages about gaming activities from the public, is subverted by the exceptions to [the ban]." *Players International*, 988 F. Supp. at 506.



116 S. Ct. at 1511 (Stevens, J.). As Justice Stevens cautioned in *44 Liquormart*, *Edge* most certainly does not establish the degree of deference to Congress to which the Government is entitled where it undertakes to suppress speech about lawful conduct. *Id.* Yet, the panel majority explicitly relied on *Edge* when it stated that this Court's cases "[do] not inhibit all legislative flexibility in confronting challenging social developments." Pet. App. 18a. The panel majority's heavy reliance upon *Edge* was misplaced.

*Edge* is readily distinguishable from this case in another important respect. In *Edge*, the Court upheld the state lottery exception to the Government's ban on the basis that it was narrowly tailored to serve an interest in balancing the competing policies of lottery and non-lottery states. *Edge*, 509 U.S. at 435, 113 S. Ct. at 2708. Here, on the other hand, the Government asserted an entirely different interest -- one that is inconsistent with the federalism interest identified in *Edge*. The Government claims here it is protecting the interests of the handful of non-gaming states, but obviously it can only do so at the expense of the interests of the many states that have legalized gaming. Thus, the irrationality of the Government's ban is complete. On the one hand, the overall scheme is intended to serve one interest, while on the other hand, a component of the scheme, the state lottery exception, is intended to serve another interest that is mutually inconsistent with the overall purpose of the ban. This is precisely the kind of illogical regulatory scheme that cannot withstand First Amendment scrutiny after *44 Liquormart* and *Rubin*.

**2. The Government's casino advertising ban is more extensive than necessary to serve the Government's asserted interests, and therefore fails the fourth part of the *Central Hudson* test.**

The fourth part of the *Central Hudson* analysis requires that the Government demonstrate with evidence that its ban is no more extensive than necessary to serve its asserted interests. That requirement is reiterated in *44 Liquormart*, where Justice O'Connor stated that "[t]he State's regulation must indicate a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.'" *44 Liquormart*, 517 U.S. at 529, 116 S. Ct. at 1521 (citations omitted); *City of Cincinnati*, 507 U.S. at 417, n. 13, 113 S. Ct. at 1510, n. 13 (1993). The fourth part of *Central Hudson* is not met if there are obvious alternative means of serving the Government's interests that would impose a lesser burden, or no burden at all, on protected speech. *See 44 Liquormart*, 517 U.S. at 530, 116 S. Ct. at 1522 (O'Connor, J., concurring); *Rubin*, 514 U.S. at 490-91, 115 S. Ct. at 1593-94; *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142-43, 114 S. Ct. 2084, 2088-89 (1994).

In this case, the appeals court acknowledged that,

> [a]fter *44 Liquormart*, . . . the fourth-prong 'reasonable fit' inquiry under *Central Hudson* has become a tougher standard for the state to satisfy. Little deference can be accorded to the state's legislative determination that a commercial speech restriction is no more onerous than necessary to serve the government's interests.



Pet. App. 10a-11a. However, in spite of these observations, the panel majority went on to grant remarkable deference to the Government in connection with its advertising ban. The panel majority seemed to conclude that, if a speech restriction such as this one includes a variety of exceptions -- "quintessentially legislative choices," as the panel majority called them (Pet. App 9a) -- then it must be reasonably tailored to fit the Government's goals. In essence, the panel majority held that the mere "ambivalence" toward the various forms of gaming embodied in the Government's ban -- "ambivalence" unsupported by reason, much less by evidence presented to the court -- was sufficient to demonstrate a reasonable fit between the ban and the Government's asserted interests. Pet. App. 14a-16a. For support of this oddly distorted interpretation of *Central Hudson*'s fourth part, the majority turned to this Court's decision in *Edge*. But, as this petition has already shown, *Edge* arguably stands for little more than the proposition that the Government may restrict commercial speech that proposes an illegal transaction, i.e. speech that fails *Central Hudson*'s first part. *See, supra* at 27-28. At the very least, *Edge* most certainly cannot provide a basis for the appeals court's finding that, even though the Government failed to bring forth proof of narrow tailoring, the ban passed muster under *Central Hudson*'s fourth part.

Furthermore, the panel majority erroneously stated that Broadcasters "have identified no non-speech-related alternatives to § 1304 as a means of assisting anti-gambling states." Pet. App. 17a. This was a

conspicuous oversight, since Broadcasters' reply brief on remand enumerated seventeen alternatives. In the first place the Government has not attempted to outlaw gaming. The Government could sponsor its own broadcast announcements to counteract advertising for casinos, and the Government could undertake a variety of other direct approaches to the regulation of gaming. For example, the Government could easily sponsor or mandate: (1) in- and out-patient treatment programs for compulsive gamblers, (2) prevention and educational programs in schools and communities, (3) crisis and intervention services, (4) referral services, (5) toll-free counseling hotlines, (6) public service announcements in broadcast and other media, (7) training for counselors and other professionals who deal with compulsive gamblers, (8) distribution of informational brochures at casinos, (9) informational and educational displays at casinos, (10) publication of hotline numbers at all casinos and on all casino documentation, (11) development of gambling awareness curricula in concert with educational institutions, (12) distribution of informational and educational videos, (13) informational inserts in governmental employee paychecks, (14) certification programs for compulsive gambling counselors, (15) informational and educational programs for prison inmates, and (16) youth awareness programs.

"It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's asserted] goal[s]." *44 Liquormart*, 517 U.S. at 507, 116 S. Ct. at 1510 (Stevens, J.); *see also id.* 517 U.S. at 530, 116 S. Ct. at 1522 (O'Connor, J., concurring). This multitude of alternative means of



serving the Government's asserted interests is "readily available," and the panel majority's complete indifference to it is a grievous misinterpretation of commercial speech doctrine after *44 Liquormart*. The Government's ban fails the fourth part of *Central Hudson*, because the ban is not narrowly tailored to serve any of the Government's asserted interests. For this additional reason, the Court should reverse the appeals court's judgment and declare that the ban violates the First Amendment.

**III. Conclusion.**

The Government's advertising ban is an intolerable suppression of Broadcasters' right to speak freely and truthfully about lawful commercial activities. By sanctioning the ban, the Fifth Circuit court departed from this Court's teachings and established a precedent that can only engender further erosion of the First Amendment's guarantee of free speech. For these reasons, Broadcasters respectfully submit that the Court should reverse the judgment of the Fifth Circuit court and declare the Government's ban to be a violation of the First Amendment.

Respectfully submitted,

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No. 98-387

# In the Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to petitioners' broadcast advertisements for legal casino gambling.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-387

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 149 F.3d 334. A prior opinion of the court of appeals (Pet. App. 23a-42a) is reported at 69 F.3d 1296. The opinion of the district court (Pet. App. 43a-56a) is reported at 866 F. Supp. 975.

### JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. The petition for a writ of certiorari was filed on September 2, 1998, and was granted on January 15, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATEMENT

1. Section 1304 of Title 18, U.S.C., prohibits the broadcasting of "any advertisement of * * * any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." Section 1304 is part of a longstanding body of federal restrictions on interstate promotion of gambling

activities. See 18 U.S.C. 1301-1307; 39 U.S.C. 3001, 3005; see generally *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 421-423 (1993).

a. In 1868, Congress made it a crime to mail "any letters or circulars" concerning "lotteries, so-called gift concerts, or other similar enterprises." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. After briefly limiting that prohibition to illegal lotteries, Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302, Congress extended the ban in 1876 to all lotteries and related gambling enterprises, including ones chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90. In 1890, Congress extended the mailing prohibition from "letters or circulars" to newspapers. Anti-Lottery Act, ch. 908, § 1, 26 Stat. 465. The Court sustained the constitutionality of the 1876 statute under the First Amendment in *Ex parte Jackson*, 96 U.S. 727 (1877), and rejected a First Amendment challenge to the 1890 law in *In re Rapier*, 143 U.S. 110 (1892).

In 1895, Congress undertook to eliminate interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate or foreign commerce. Act of Mar. 2, 1895, ch. 191, 28 Stat. 963. In *Champion* v. *Ames*, 188 U.S. 321 (1903) (*Lottery Case*), the Court held the prohibition on interstate transportation of lottery tickets to be within the power of Congress under the Commerce Clause. In its opinion, the Court summarized the policies behind federal anti-lottery laws. The Court explained that lotteries were regarded by Congress as a "widespread pestilence." *Id.* at 356. The Court concluded that Congress "shared the views" that a lottery is pernicious because it "enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; [and] it plunders the ignorant and simple." *Id.* at 355, 356. In addition, States that had themselves banned lotteries required congressional



assistance to deal with the interstate aspects of lotteries. Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Id.* at 357. Thus, Congress had validly acted both to protect the public against the social ills associated with lotteries and to reinforce the efforts of anti-lottery States.

b. In the Communications Act of 1934, Congress extended the existing federal restriction on the interstate distribution of gambling advertising from print to broadcast media. Section 316 of the Communications Act, which prohibits broadcast licensees from airing advertisements for any "lottery, gift enterprise, or similar scheme," Ch. 652, § 316, 48 Stat. 1088, is now codified as amended at 18 U.S.C. 1304.

Although Section 1304 is a criminal statute, it traditionally has not been enforced through criminal prosecutions. Instead, enforcement has been carried out administratively by respondent Federal Communications Commission (FCC), which has general responsibility for regulating television and radio broadcasting under the Communications Act. The FCC has adopted a regulation (47 C.F.R. 73.1211) that parallels Section 1304, and it can impose a variety of administrative sanctions for violations of the regulation, including monetary forfeitures and license revocation. See 47 U.S.C. 312(a)(6), 503(b)(1)(D) and (2)(A).

Section 1304 is not confined to lotteries but applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 290 (1954), this Court construed "lottery, gift enterprise, or similar scheme" to encompass any undertaking involving: "(1) the distribution of prizes; (2) ac-

cording to chance; (3) for a consideration." Because virtually all casino gambling involves "the distribution of prizes" (money), "according to chance," "for a consideration" (the gambler's wager), the FCC has treated casino gambling as a form of "lottery, gift enterprise, or similar scheme." As indicated below, Congress has likewise proceeded on the understanding that advertising for casino gambling is subject to Section 1304, and petitioners do not dispute that understanding in this Court.

2. Since the enactment of the Communications Act, Congress has amended Section 1304 on several occasions to permit broadcast advertising of specific types of gambling. However, Congress has expressly declined to permit broadcast advertising of private commercial casino gambling.

a. In 1950, Congress amended Section 1304 and related provisions to permit advertising of non-profit fishing contests. Act of Aug. 16, 1950, ch. 722, 64 Stat. 451 (codified at 18 U.S.C. 1305). Congress did so on the ground that fishing contests are "innocent pastimes" that are "far removed from the reprehensible type of gambling activity which it was paramount in the congressional mind to forbid." S. Rep. No. 2242, 81st Cong., 2d Sess. 2 (1950).

b. During the late 1960s and early 1970s, a growing number of States began to conduct lotteries to raise money for government programs. In 1975, Congress amended the federal gambling statutes to take account of the growth of state-run lotteries. Congress sought to accommodate the promotion of state-run lotteries within lottery States while simultaneously continuing to discourage participation by residents of non-lottery States. See S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974); H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974). To accomplish that, Congress allowed the broadcasting



of advertisements for a state-run lottery "by a radio or television station licensed to a location in that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress also made corresponding changes in the restrictions on lottery-related mail and interstate commerce. 18 U.S.C. 1307(a)(1)(A) and(b)(1).

Although the 1975 legislation permits broadcast advertising of state-run lotteries in States that conduct lotteries, broadcast advertising of state-run lotteries remains unlawful in States that do not. In *Edge*, *supra*, this Court rejected a challenge to the constitutionality of Section 1304 as applied to a broadcaster in a non-lottery State that wished to broadcast advertisements for an adjacent State's lottery. The Court held that Section 1304's prohibition of broadcast advertising in non-lottery States does not violate the First Amendment. 509 U.S. at 426-436.

c. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 12. To accommodate the governmental interests of the Nation's Indian tribes, while simultaneously responding to concerns about potential criminal infiltration and other problems, Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. 2701 *et seq.*); see generally *Seminole Tribe* v. *Florida*, 517 U.S. 44, 48-50 (1996). In order to "promot[e] tribal economic development" (25 U.S.C. 2702(1)), IGRA authorizes various forms of Indian gambling, including casino gambling conducted in conformance with tribal-state compacts. IGRA further exempts "any gaming conducted by an Indian

tribe pursuant to this [Act]" from Section 1304's prohibition on broadcast advertising. 25 U.S.C. 2720.

IGRA also substantially tightens government oversight of Indian gambling by subjecting certain types of gambling to direct federal regulation and other types of gambling to regulatory compacts between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2713. Casino gambling is classified under IGRA as "Class III gaming," which is "the most heavily regulated of the three classes" of authorized gambling. *Seminole Tribe*, 517 U.S. at 48; see generally 25 U.S.C. 2710(d) (requirements for Class III gaming). To ensure that the revenues from gambling are used solely for public purposes, IGRA requires that net revenues be devoted exclusively to funding tribal governments, local government agencies, and charitable organizations; to promoting tribal economic development; or to providing for the welfare of the tribes and their members. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii) and (2)(A).

d. Congress further modified the operation of Section 1304 by enacting the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307(a)). That Act removes federal advertising restrictions on legal lotteries run by charitable groups and by "governmental organization[s]" other than the state-run lotteries already covered by the 1975 legislation. See 18 U.S.C. 1307(a)(2)(A). The Act also lifts advertising restrictions on "occasional and ancillary" promotional lotteries, such as a car dealership drawing for a new car. 18 U.S.C. 1307(a)(2)(B); see 134 Cong. Rec. 31,075 (1988) (Senate Judiciary Committee report) (giving examples of promotional lotteries).

As originally proposed, the 1988 legislation would have removed advertising restrictions on all gambling allowed under state law, including legal commercial



casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). However, the House of Representatives adopted an amendment to the bill specifically to leave Section 1304 undisturbed with respect to casino gambling. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee stated that "no provision of [the bill] is intended to change current law as it applies to interstate advertising of professional gambling activities." *Id.* at 31,075.

e. Broadcast advertising relating to betting on sporting events is not restricted by Section 1304. However, most sports betting and advertising of sports betting are prohibited by the Professional and Amateur Sports Protection Act, 28 U.S.C. 3701 *et seq.* Parimutuel animal racing and jai-alai are excepted from that Act's prohibitions, as are certain pre-existing state-run and state-authorized operations. See 28 U.S.C. 3704(a).

3. a. Petitioners are the Greater New Orleans Broadcasting Association (GNOBA) and individual members of the association. GNOBA's members wish to broadcast promotional advertisements for legal commercial casino gambling conducted in Louisiana and Mississippi. Under appropriate conditions, broadcast signals from Louisiana broadcasting stations may be heard not only in Louisiana, but also in adjoining States, including Texas and Arkansas, which prohibit casino gambling. Reply in Supp. of Def.'s Cross-Mot. for Summ. J., Decl. of Robert D. Greenberg ¶ 4.

Petitioners filed suit against respondents in February 1994 in the United States District Court for the Eastern District of Louisiana. Petitioners asserted that Section 1304 does not prohibit broadcast advertising for legal casino gambling and, alternatively, that the application of Section 1304 to advertisements

for legal casino gambling violates the First Amendment and other constitutional provisions. Compl. ¶¶ 13, 36-44. Petitioners asked the district court to enjoin the enforcement of Section 1304 against them and to declare that Section 1304 is unconstitutional "as so construed and applied to" them. *Id.*, Relief Requested ¶¶ B and C.[1]

Petitioners' First Amendment challenge was based on the commercial speech principles of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny. Under *Central Hudson*, a legislative limitation on commercial speech is subject to a four-part inquiry: first, whether the speech "accurately inform[s] the public about lawful [commercial] activity," *id.* at 563; second, "whether the asserted governmental interest [underlying the speech regulation] is substantial," *id.* at 566; third, "whether the regulation directly advances the governmental interest asserted," *ibid.*; and, finally, "whether it is not more extensive than is necessary to serve that interest" (*ibid.*). Petitioners asserted that they intend to broadcast truthful advertisements for lawful casino gambling, thereby bringing their advertising within the ambit of the First Amendment under the first *Central Hudson* inquiry, and that the application of Section 1304 to their advertising fails to satisfy each of *Central Hudson's* remaining inquiries.

Petitioners and the government filed cross-motions for summary judgment regarding the constitutionality

[1] Petitioners also challenged the constitutionality of 47 C.F.R. 73.1211, the FCC regulation that parallels Section 1304. There are no material differences between the terms of the FCC regulation and Section 1304 itself, and petitioners did not assert that the FCC regulation stands in a different position from Section 1304 with respect to their First Amendment claim.



of Section 1304. The district court entered summary judgment in favor of the government, holding that the application of Section 1304 to petitioners' proposed casino gambling advertisements satisfies the constitutional standards of *Central Hudson*. Pet. App. 43a-56a. On appeal, the Fifth Circuit affirmed. Pet. App. 23a-37a.

b. Petitioners then filed a petition for a writ of certiorari. *Greater New Orleans Broad. Ass'n* v. *United States*, No. 95-1708. While the petition was pending, this Court decided *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996).

In *44 Liquormart*, the Court held that two Rhode Island statutes prohibiting the advertising of retail liquor prices violated the First Amendment. Four Members of the Court proposed departing from the basic framework of *Central Hudson* by applying more "rigorous" judicial review to advertising restrictions intended to reduce public demand for a lawful product or service. See 517 U.S. at 501-504 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment). A majority of the Court, however, declined to depart from the framework established by *Central Hudson*. See *id.* at 528 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment); *id.* at 518 (Scalia, J., concurring in part and concurring in the judgment). Nonetheless, the Court did reject elements of its earlier commercial speech decision in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which had sustained the constitutionality of a Puerto Rico statute restricting casino gambling advertising, and the Court clarified the requirements of *Central Hudson* in several other respects. See 517 U.S. at 508-514 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.); *id.* at 529-532

(O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment).

c. In light of its intervening decision in *44 Liquormart*, the Court vacated the Fifth Circuit's original decision and remanded for further consideration. On remand, the Fifth Circuit again sustained the constitutionality of Section 1304. Pet. App. 1a-19a. Chief Judge Politz dissented. *Id.* at 20a-22a. Because petitioners' intended advertising is assumed to be truthful, and because the court regarded the governmental interests underlying Section 1304 as unquestionably substantial, the court directed its attention on remand principally toward the final two components of the *Central Hudson* analysis.

With respect to the third *Central Hudson* component, the court of appeals reasoned that Section 1304's prohibition on promotional advertising has a more direct and obvious impact on consumer demand than the restrictions on price advertising in *44 Liquormart*, which affected demand only indirectly. Pet. App. 8a-9a. The court also found "no doubt" that Section 1304 "reinforces the policy of states, such as Texas, which do not permit casino gambling." *Id.* at 10a. The court acknowledged that Congress has enacted exceptions to Section 1304, but held that "[t]he government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that the social impact of activities such as state-run lotteries, Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope." *Id.* at 9a-10a.

Turning to the fourth part of the *Central Hudson* test, the court of appeals recognized that "[a]fter *44 Liquormart*, * * * the fourth-prong 'reasonable fit' inquiry * * * has become a tougher standard for the



[government] to satisfy." Pet. App. 10a. Applying that "tougher standard," the court held that Section 1304 "cannot be considered broader than necessary to control participation in casino gambling." *Id.* at 16a. The court pointed out that Section 1304, unlike the Rhode Island statutes struck down in *44 Liquormart*, does not ban all forms of advertising; instead, it "targets the powerful sensory appeal of gambling conveyed by television and radio, which are also the most intrusive advertising media, and the most readily available to children," while permitting intrastate advertising in other media. *Ibid.* The court also pointed out that, although the indirect technique of restricting price advertising that Rhode Island employed in *44 Liquormart* was obviously less effective than direct regulatory means of reducing alcohol consumption, "regulation of promotional advertising directly influences consumer demand," and the effectiveness of non-advertising means of discouraging demand for casino gambling is speculative. *Id.* at 16a-17a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 60 years, 18 U.S.C. 1304 has restricted the use of broadcast media for the commercial promotion of gambling activities. The court of appeals correctly held that Section 1304's longstanding restriction on the broadcasting of advertisements does not violate the First Amendment as applied to petitioners' broadcast advertisements for private casino gambling.

Under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), and its progeny, Section 1304's application to petitioners' advertisements is subject to a four-part inquiry. The parties do not dispute the answer to the first part of that inquiry—we assume petitioners' advertisements are accurate and concern a lawful commercial activity.

The first question for the Court is therefore whether the interests that the government asserts in support of Section 1304 are substantial ones. Every court that has considered that question has concluded that the government has substantial interests in reducing the social costs associated with gambling and in assisting States that restrict gambling within their own borders and wish to protect their citizens from the harms incurred by gambling in other jurisdictions. Those interests, which motivated the original federal limitations concerning gambling, are equally valid today. Gambling creates significant social costs, including the devastating effects of compulsive gambling and the criminal activity associated with gambling. And States that prohibit casino gambling cannot protect their residents from the harms of casino gambling in other jurisdictions without federal assistance.

The next question for the Court is whether Section 1304 directly and materially advances the government's interests. The statute does so in two ways. First, it reduces gambling and its consequent social ills by limiting advertising in the most powerful media available to convey gambling's allure—television and radio. Second, it assists States that prohibit casino gambling by shielding their residents from broadcasts advertising casino gambling in neighboring jurisdictions. The statutory exceptions that Congress has enacted do not prevent Section 1304 from advancing the government's interests. In each instance, the exceptions involve forms of gambling that either pose a lesser risk of social harm or offer substantial countervailing social benefits.

The final question is whether Section 1304 is more extensive than necessary to serve the government's interests. It is not. Petitioners' speculation about the possible efficacy of regulatory alternatives that do not



restrict speech falls well short of showing that Section 1304 is substantially overbroad.

## ARGUMENT

### THE APPLICATION OF 18 U.S.C. 1304 TO BROADCAST ADVERTISEMENTS FOR LEGAL CASINO GAMBLING DOES NOT VIOLATE THE FIRST AMENDMENT

From its inception, Section 1304 has served two basic purposes: to reduce the well-recognized social costs associated with gambling activities by reducing public demand for those activities and to provide assistance to States that restrict gambling within their own borders and wish to protect their citizens against the harms incurred by gambling in other jurisdictions. Congress has modified the original advertising prohibition to accommodate particular kinds of gambling, such as state-run lotteries, Indian gambling, and charitable gambling, that Congress reasonably regards as posing fewer underlying risks or providing countervailing public benefits. But, with respect to commercial casino gambling, which accounts for nearly 40% of all gambling revenue in the United States, Congress has found it appropriate to maintain the prohibition on broadcast advertising. The First Amendment does not prohibit Congress from regulating casino gambling advertising in that fashion.

#### I. Substantial Government Interests Underlie Section 1304

Petitioners have not questioned the continued validity of the analysis that this Court set out in *Central Hudson*, but rather argue that Section 1304 does not pass muster under that analysis.[2] Because

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[2] Amicus American Advertising Federation (AAF) argues for strict scrutiny of restrictions on commercial speech. AAF con-

petitioners challenge the constitutionality of Section 1304 solely with respect to truthful and non-misleading advertising about lawful casino gambling, the constitutional inquiry in this case begins with the question

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tends (Br. 5-24) that the historical record shows an understanding at the time of the adoption of the First and Fourteenth Amendments that truthful speech about lawful commercial transactions was not subject to government regulation. The relevance of the historical understanding at the time of the Fourteenth Amendment is unclear, because this case (unlike *44 Liquormart*) involves a speech regulation imposed by the federal government, which is not subject to the Fourteenth Amendment. In any event, the historical evidence does not support AAF's contention. As AAF acknowledges (Br. 14), many state statutes in the late 18th century prohibited the advertisement of lotteries. AAF incorrectly asserts (*ibid.*) that those statutes prohibited only advertisements of illegal lotteries. To the contrary, the statutes often prohibited advertisements of all lotteries other than those run by the State or the United States, and thus prohibited (sometimes explicitly) advertisements of *legal* lotteries operated by other States. See, *e.g.*, Act for Suppressing and Preventing of Private Lotteries, 1762 S.C. Acts, No. 926 (criminalizing advertisements of "any lottery to be drawn out of this Province" and "any foreign or other lottery"); Act to Prevent Private Lotteries, 1783 N.Y. Laws, ch. 12 (criminalizing promotion of any lottery "other than such as shall be authorized by the legislature"); see also 1860 Md. Laws, art. 30, § 118 (criminalizing advertising of "all lotteries, whether authorized by any other State, district or territory, or by any foreign country"). Even if AAF were correct that state legislatures did not generally regulate truthful speech about lawful commercial transactions at the time of the adoption of the First Amendment, AAF offers virtually no evidence that "the *reason* [that such regulation] was not engaged in" was that "it was thought to violate the right" embodied in the First Amendment. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., joined by the Chief Justice, dissenting). The failure to employ commercial speech restrictions for regulatory purposes could reflect instead the more general absence, in the late 18th century, of the regulatory programs that characterize modern government. Cf. *id.* at 374.



"whether the asserted governmental interest[s]" underlying Section 1304 are "substantial" ones. *Central Hudson*, 447 U.S. at 566. That question has been answered affirmatively by every court that has addressed the constitutionality of Section 1304, even those that have gone on to sustain First Amendment challenges to Section 1304 on other grounds. See Pet. App. 28a-31a (Jones & Parker, JJ.); *id.* at 38a (Politz, C.J., dissenting); *Valley Broad. Co.* v. *United States*, 107 F.3d 1328, 1331-1333 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998); *Players Int'l, Inc.* v. *United States*, 988 F. Supp. 497, 501-504 (D.N.J. 1997), appeal pending, No. 98-5127 (3d Cir.). Petitioners offer no reason for this Court to "disagree with the accumulated, commonsense judgments" of Congress and "the many reviewing courts"—judgments supported by ample evidence—that the governmental interests at stake here are "real and substantial." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion).

**A. Reducing The Social Costs Of Casino Gambling**

1. Congress enacted the original federal anti-lottery statutes based on its judgment that lotteries and similar gambling activities impose pervasive and potentially destructive costs on society. In this Court's words, Congress concluded that "the widespread pestilence of lotteries * * * infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Lottery Case*, 188 U.S. at 356. Similarly, Section 1304 and related federal statutes (see pp. 1-7, *supra*) today reflect Congress's considered and long-standing judgment that gambling contributes to corruption and the growth of organized crime; that it underwrites bribery, narcotics trafficking, and other crimes; that it imposes a regressive tax on the poor, the

persons who are least able to bear that burden; and that it offers a false but sometimes irresistible hope of financial advancement. Section 1304 is designed to reduce those social ills by discouraging public participation in casino gambling and other forms of "lotter[ies], gift enterprise[s], [and] similar scheme[s]." When supporters of the casino gambling industry sought unsuccessfully to amend Section 1304 in 1988 to allow casino gambling advertising (see pp. 6-7, *supra*), the social costs of gambling, and the role of Section 1304 in limiting those costs, were specifically advanced as grounds for rejecting the proposed change. See 134 Cong. Rec. 12,281 (1988) (Rep. Wolf).

Many of the social costs associated with casino gambling involve compulsive gambling, a recognized psychological disorder that is referred to clinically as "pathological gambling." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* § 312.31, at 615-618 (4th ed. 1994) (*reprinted in* Gov't Lodging (GL) 180-184).[3] The National Council on Problem Gambling has estimated that at least 3 million Americans are compulsive gamblers, and other estimates are comparable. See *id.* at 617; *Pathological Gambling*, 12 Harv. Mental Health Letter (Harv. Med. Sch., Boston, Mass.), Jan. 1996, at 1; *National Gambling Impact and Policy Commission Act: Hearing on H.R. 497 Before the House Comm. on the Judiciary* (*Gambling Hearing*), 104th Cong., 1st Sess. 91 (1995) (statement of Paul R. Ashe, President, National Council on Problem Gambling, Inc.) (GL 183, 185, 193). Compulsive gambling behavior is primarily associated with

[3] This document and many others cited in this brief are reproduced in the court of appeals' appendix in *Players International, Inc.* v. *United States*, No. 98-5127 (3d Cir.), copies of which have been lodged with the Court.



forms of gambling that permit "continuous" play, such as slot machines and other forms of casino gambling. Dickerson, *Gambling: A Dependence without a Drug*, 1 Int'l Rev. of Psychiatry 157, 159 (1989); Lester, *Access to Gambling Opportunities and Compulsive Gambling*, 29 Int'l J. Addictions 1611, 1612 (1994) (state-by-state prevalence of Gamblers Anonymous chapters is positively correlated with casinos, legalized card rooms, and slot machines, but not with charitable gambling and most forms of simple state lotteries) (GL 270, 284). Although only a relatively small percentage of gamblers engage in compulsive gambling behavior, it has been estimated that compulsive gamblers account for a disproportionate share of casino revenues. *Gambling Hearing* at 373, 381 (more than 50% of casino revenues) (GL 249, 257).

The incidence of compulsive gambling has grown in step with the nationwide expansion of legalized gambling. *Gambling Hearing* at 105; Lesieur & Custer, *Pathological Gambling: Roots, Phases, and Treatment* (*Pathological Gambling*), 474 Annals Am. Acad. Pol. & Soc. Sci. 146, 148-149 & n.15 (July 1984); Politzer et al., *The Epidemiological Model and the Risks of Legalized Gambling: Where Are We Headed?*, 16 Health Values 20, 23-24 (Mar./Apr. 1992) (GL 207, 294-295, 308-309). In Iowa, for example, the estimated percentage of compulsive gamblers among the adult population grew from 1.7% in 1989, before the State legalized riverboat gambling, to 5.4% in 1995. *Pathological Gambling* at 1-2 (GL 185-186). And the problem is at least as severe among youth: a review of nine studies of adolescent gambling in North America found a 5.4% rate of compulsive gambling. *Ibid.*

Estimates of the purely economic costs of compulsive gambling amount to billions of dollars annually. See, *e.g.*, Politzer et al., *supra*, at 24 (estimated cost of $80

billion in 1988); *Dead Broke*, Minneapolis Star Tribune, Dec. 3, 1995, at A18 (estimated annual cost of $300 million in Minnesota alone) (GL 309, 321). Non-economic costs associated with compulsive gambling are, if anything, even more grave. See, *e.g.*, Gaudia, *Effects of Compulsive Gambling on the Family*, 32 Soc. Work 254 (May/ June 1987); Dickerson, *supra*, 1 Int'l Rev. of Psychiatry at 161-163 (GL 335-337, 272-274). For each compulsive gambler, an estimated 10 to 17 people are affected by the gambler's problems. Politzer et al., *supra*, at 25 (GL 310). For the compulsive gambler himself, the toll includes deteriorating relations with family, depression, and in some cases, suicide; for the compulsive gambler's family, the toll includes emotional turmoil, stress-related diseases, lack of financial support, neglect, abuse, and divorce. *Gambling Hearing* at 91, 106-108; Harden & Swardson, *Addiction: Are States Preying on the Vulnerable?*, Washington Post, Mar. 4, 1996, at A8; Murray, *Review of Research on Pathological Gambling*, 72 Psychol. Rep. 791, 794 (1993) (GL 193, 208-210, 292, 341). The children of compulsive gamblers are particularly vulnerable: they perform worse academically than their peers, are more likely to have alcohol, gambling, or eating disorders, and are more likely to be depressed and attempt suicide. *Gambling Hearing* at 106; Dickerson, *supra*, 1 Int'l Rev. of Psychiatry at 162; Jacobs et al., *Children of Problem Gamblers*, 5 J. Gambling Behav. 261, 261-268 (Winter 1989) (GL 208, 273, 359-366).[4]

[4] Contrary to petitioners' suggestion (Br. 19-21), the government's interest in reducing compulsive gambling is fully consistent with its interest in reducing demand for casino gambling. Compulsive gambling is one of the more costly social problems associated with casino gambling; and the goal of reducing compulsive gambling is a significant, subsidiary component of the broader goal of reducing the social costs of casino gambling. Nor is the government disabled from relying on compulsive gambling (*id.* at 19-20) because the government did not focus on that particular aspect of gambling's social ills until the remand following the initial court of appeals decision in this case. Indeed, the government may defend a restriction on commercial speech by relying on an interest entirely different from the one asserted when the restriction was enacted. See *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983). Finally, contrary to the suggestion of amicus National Association of Broadcasters et al. (NAB) (Br. 14), the goal of reducing compulsive gambling and the social costs it imposes is not rendered insubstantial because compulsive gamblers are a minority of the population. Such a principle would call into question the validity of interests that the Court has repeatedly recognized as substantial, such as the interest in protecting children. See, *e.g.*, *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 749 (1978). Moreover, the social costs of compulsive gambling fall on many additional persons (see p. 18, *supra*) and ultimately on the government as well.



In addition to providing both a stimulus and an outlet for compulsive gambling, casinos have traditionally been a lure for organized crime and other kinds of criminal activity. As this Court noted, "the vast amount of money that flows daily through a casino operation and the large number of unrecorded transactions make the [casino] industry a particularly attractive and vulnerable target for organized crime." *Brown* v. *Hotel Employees Local 54*, 468 U.S. 491, 495 (1984). Congress has repeatedly noted the attraction of casino gambling for organized crime and has been presented with evidence documenting that relationship. See, *e.g.*, Congressional Statement of Findings and Purpose Preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; *Message From the President of the United States Relative to the Fight Against Organized Crime*, H.R. Doc. No. 105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 71 (1969); President's

Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Comm'n on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); President's Comm'n on Organized Crime, *Record of Hearing VII: Organized Crime and Gambling* (1985) (GL 47-97).

Casino gambling is also associated with other criminal activity, such as street crime and white collar crime. See, *e.g.*, Curran, *The House Never Loses and Maryland Cannot Win: Why Casino Gaming Is a Bad Idea* (1995) (GL 106-179); Kindt, *U.S. National Security and the Strategic Economic Base: The Business/ Economic Impacts of the Legalization of Gambling Activities*, 39 St. Louis U. L.J. 567, 579-580 & n.96 (Winter 1995); Nat'l Opinion Research Ctr., *Overview of National Survey and Community Database Research on Gambling Behavior* (*NORC Report*) 62, 67 (1999).

In *Posadas*, this Court held that the government interest in minimizing the social ills of gambling, particularly casino gambling, is a substantial one. In *Posadas*, the Puerto Rico legislature legalized casino gambling but prohibited casinos from directing gambling advertisements at residents of Puerto Rico. See 478 U.S. at 331-336. The Court held squarely that there is a substantial governmental interest in reducing demand for casino gambling:

> The interest at stake in this case * * * is the reduction of demand for casino gambling by the residents of Puerto Rico. * * * [The legislature] belie[ved] that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest.



*Id.* at 341 (internal citation omitted).

As noted above, the Court's recent decision in *44 Liquormart* rejects other aspects of the Court's reasoning in *Posadas*. In particular, the Court repudiated *Posadas*'s holding that the First Amendment gives legislatures free rein to choose between commercial speech restrictions and regulatory alternatives that do not restrict speech. See *44 Liquormart*, 517 U.S. at 509-510 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.); *id.* at 531-532 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment). But nothing in *44 Liquormart* casts doubt on the continued vitality of the holding in *Posadas* that the government's interest in reducing the social costs of casino gambling is substantial.

As described at p. 18, *supra*, the costs of casino gambling fall not only on gamblers themselves, but also on their families, their employers, and their communities. See also 134 Cong. Rec. 12,281 (1988) (Rep. Wolf); *NORC Report* at 33-38. As a result of those "negative externalities," see, *e.g.*, *McCloud* v. *Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996), the government's interest in discouraging public participation in casino gambling is not a mere exercise in "paternalism." Instead, the gov-

ernment has an interest in protecting society at large from the public harms caused by that private activity.

2. Petitioners do not dispute the significant social costs caused by casino gambling or the continued validity of the holding in *Posadas* that the government's interest in minimizing those costs is substantial. Instead, they incorrectly assert (Pet. Br. 19) that only *state* governments have a cognizable interest in addressing the social costs of casino gambling, and the federal government must defer to States such as Louisiana that have chosen to permit casino gambling.

It is well established, however, that Congress may use its Commerce Clause powers to "legislat[e] against moral wrongs." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964). "The power to regulate commerce is plenary, and once the power exists it is for Congress, not the courts, to choose the ends for which its exercise is appropriate." *United States* v. *Helsley*, 615 F.2d 784, 787 (9th Cir. 1979) (Kennedy, J.) (internal citation omitted). See *United States* v. *Darby*, 312 U.S. 100, 115 (1941). "The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 569-570 (1939). As a result, "it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 147 (1938).

Congress has regulated gambling and activities connected with it for more than 100 years. See p. 2, *supra*. Indeed, one of the first cases to recognize Congress's power to legislate against social ills under the Commerce Clause was the *Lottery Case* itself. The Court there held that, just as a State may restrict



lottery activities within its borders "for the purpose of guarding the morals of its own people," so may Congress restrict interstate lottery activities "for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries.'" 188 U.S. at 357. Thus, if a State may assert a legitimate and substantial interest in reducing the social costs of gambling by regulating *intrastate* gambling advertising, as the Court held in *Posadas*, the federal government may assert an equally legitimate and substantial interest in reducing the same costs by regulating *inter*state advertising under the Commerce Clause.

The suggestion that the federal government must defer to the policy judgments of States that have chosen to legalize casino gambling stands the constitutional relationship of the federal government and the States on its head. Congress has plenary authority under the Commerce Clause to regulate interstate commerce, and broadcast advertising is the quintessence of interstate commerce. See *Fisher's Blend Station, Inc.* v. *State Tax Comm'n*, 297 U.S. 650, 655 (1936) ("By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."). If Congress chooses to exercise its constitutional authority over interstate commerce in ways that may undermine the policies of particular States, the Supremacy Clause dictates that the federal government's policy choices must prevail. Indeed, when Congress regulates private conduct under the Commerce Clause, the federal policy underlying Congress's enactments *becomes* state policy. See *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 57 (1912).

3. Petitioners are also mistaken in arguing (Br. 19) that the statutory exceptions to Section 1304 (see pp. 4-

7, *supra*) "preclude[] a finding * * * that the Government has a substantial interest in suppressing legal gaming." The contention that the exceptions prevent the accomplishment of that interest bears not on whether the interest is substantial (the second *Central Hudson* inquiry), but on whether the statute directly advances that interest (the third *Central Hudson* inquiry). As we show below (see pp. 37-43, *infra*), the exceptions to Section 1304 do not prevent Section 1304 from directly advancing the government's interests. But whether or not they do, the exceptions are irrelevant to whether those interests are substantial.

The Court's decision in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), illustrates the point. As discussed more fully below, the Court held in *Coors* that a federal restriction on beer labeling failed to advance the government's interest in preventing competition among brewers based on alcohol strength because "exemptions and inconsistencies * * * ensure[d] that the labeling ban w[ould] fail to achieve that end." *Id.* at 489. The existence of those "exemptions and inconsistencies" did not, however, prevent the Court from holding that the government's interest in discouraging strength wars was a substantial one, a conclusion the Court reiterated when discussing the statute's various exceptions. See *id.* at 485, 489.

Petitioners' argument that the exceptions logically contradict the existence of the asserted federal interest erroneously presupposes that there are no material differences between the gambling activities for which broadcast advertising is prohibited and the gambling activities for which broadcast advertising is allowed. To the contrary, the statutory exceptions reflect Congress's considered judgment that the kinds of gambling that may be advertised either do not pose the same



risks as private casino gambling or provide countervailing public benefits that commercial casino gambling does not produce. And, as explained below, the legislative judgments that underlie the statutory exceptions to Section 1304 are entirely legitimate ones (see pp. 37-40, *infra*).

4. Although petitioners do not dispute the social costs associated with casino gambling, amicus American Gaming Association (AGA) asserts that casino gambling "[d]oes [n]ot [p]roduce [s]ubstantial[] [h]armful [e]ffects" (Br. 7), and "[a]ny harms" from casino gambling "are offset by the industry's positive economic and social effects" (Br. 14). AGA's contentions and the material lodged by the AGA in support of those contentions are predictably one-sided. Their selective character may be appreciated by comparing AGA's submission with the literature cited above and the other materials previously lodged by the government. Moreover, much of AGA's own submission supports, rather than refutes, the existence of significant social and economic costs attributable to casino gambling.

For example, AGA has submitted a recent report prepared by the National Opinion Research Center (NORC) for the National Gambling Impact Study Commission.[5] Among other things, NORC conducted a survey of "the impact of increased access to legalized casino gambling" in ten communities. See *NORC Report* at 57. All but one of the surveyed communities reported an increase in debt problems or bankruptcies following the introduction of casino gambling; five

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[5] That Commission was created by Congress in 1996 to conduct "a comprehensive legal and factual study of the social and economic impacts of gambling in the United States." Pub. L. No. 104-169, § 4(a)(1), 110 Stat. 1484. The Commission's report is due by June 20, 1999. § 4(b), 110 Stat. 1484.

communities reported increases in youth crime; seven communities reported increases in "white collar crimes such as forgery and credit card theft"; six communities reported increases in domestic violence; "[a] number of social service staff across several communities" reported "an overall increase in 'family stress' due to gambling"; "[s]even communities reported either an increase in suicide since the casinos opened, or having seen cases where people ended their lives due to problems stemming from their gambling"; seven communities reported numerical increases in problem and pathological gambling; "every single case study [indicated] that substance abuse is a major problem in these communities," and "[m]any interviewees" attributed increased substance abuse to gambling. *Id.* at 62-64.

The *NORC Report* further states that "respondents in five [of the ten] communities opined that casinos * * * generate more problems for gamblers than other types [of gambling] such as the lottery or racetracks," and "[i]n only one of our case study communities did the [state] lottery seem to be a problem for a significant proportion of residents." *NORC Report* at 60. Interviewees in at least four communities concluded that casino gambling is more habitual than previously available gaming opportunities, so that those who do gamble, gamble more frequently and intensively. *Id.* at 63.

NORC's review of the economic consequences of problem and pathological gambling also confirms that gambling disorders impose significant societal costs. The *NORC Report* confirms that, like alcoholism, "inappropriate and/or excessive [gambling] participation * * * can extract an undesirable toll on individuals, family, friends, and the surrounding community." *NORC Report* at 33. NORC estimates that approximately 4 million adults are "lifetime" problem or



pathological gamblers, and 1 million to 1.5 million adults have engaged in problem or pathological gambling within the past year. *Id.* at 23. NORC further estimates that a typical problem or pathological gambler incurs recurring economic costs (separate and apart from his gambling losses) of $1,000-$2,000 per year, and generates non-recurring "lifetime" economic costs of about $5,000-$6,000 for himself and about $3,000 for his creditors. *Id.* at 33-35 (Tab. 1). When the number of adult problem and pathological gamblers is multiplied by NORC's per-gambler cost estimates, the result is billions of dollars in estimated economic losses.[6]

AGA's reasoning regarding the social benefits of gambling contains significant methodological shortcomings. For example, AGA's focus on economic benefits of casino-related jobs, wages, and tax revenues (Br. 14-16) ignores that dollars spent on gambling otherwise could, and presumably would, be spent on other goods and services. Although the introduction of legalized gambling unquestionably leads to increased employment, wages, and tax revenues in casino-related sectors, reductions in economic activity in other sectors necessarily result from the diversion of discretionary spending toward gambling. See *Gambling Hearing* at 371-373, 377 (GL 247-249, 253). Moreover, the studies cited by AGA focus on increases in employment and other indicators of economic activity in communities surrounding casinos; they do not measure the economic impact of casinos on non-casino jurisdictions. See, *e.g.*,

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[6] Other material lodged by AGA confirms the government's estimate of the size of the compulsive gambling problem, the particular danger compulsive gambling poses to youth, and the increasing rate of pathological and problem gambling. See Shaffer et al., *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Meta-analysis* iii-iv (1997).

*NORC Report* at 46-52. Casinos in destinations like Las Vegas and Atlantic City derive a high percentage of their revenues from tourists, effectively "importing" money that otherwise would be spent in other States or localities. AGA's analysis treats casino gambling expenditures as "found money"—a point of view that may be apt for the casino gambling industry, but not for the economy as a whole.

Casino gambling may well have benefits as well as costs, and the balance of costs and benefits is a matter of dispute. Indeed, it may be that a rational legislature could choose to tolerate gambling's costs in order to pursue its benefits. The government need not show otherwise to establish that Section 1304 does not impermissibly infringe on the First Amendment. The government need not establish the exact magnitude of casino gambling's social costs or the precise balance of costs and benefits. For purposes of *Central Hudson*, the government must only show that "the harms it recites are real" (*Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993)), and that is plainly the case here.

**B. Assisting States That Prohibit Casino Gambling**

The application of Section 1304 to broadcast advertisements for casino gambling also serves another, equally substantial and longstanding federal interest—assisting States that prohibit casino gambling to protect their own residents. As of 1997, only 12 States authorized the operation of private casinos. See *North American Gaming Report 1997*, Int'l Gaming and Wagering Bus., July 1997, at S4-S31 (Colorado, Illinois, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, and South Dakota). Private casino gambling remained unlawful in the remaining 38 States. States that prohibit casino gambling cannot protect their residents from the harms



caused by casino gambling in other jurisdictions without federal assistance. When a State wishes to discourage consumption by its residents of goods or services offered in other jurisdictions, "it does not have the option of direct regulation." *44 Liquormart*, 517 U.S. at 525 n.7 (Thomas, J., concurring in part and concurring in the judgment). And States cannot exclude broadcast advertising that originates in other States, because "broadcast signals, as a technological matter, cannot be confined to political boundaries." H.R. Rep. No. 1517, 93d Cong., 2d Sess. 20 (1974); *Fisher's Blend Station*, 297 U.S. at 655. As a result, without the assistance of the federal government, "non-casino states will have no effective means to protect their residents from [broadcast advertising] spillover." *Valley Broadcasting*, 107 F.3d at 1333.[7]

The federal government's interest in supporting the policies of States that restrict gambling was first articulated and endorsed by this Court in the *Lottery Case*. In discussing why Congress had prohibited interstate commerce in lottery tickets, the Court explained that Congress "said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." 188 U.S. at 357. That same federal interest is one reason that Congress has

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[7] The inability of States to exclude or restrict broadcast casino gambling advertising that originates in other States distinguishes Section 1304 from the federal alcohol labeling law at issue in *Coors*. There, the Court held that the federal government did not have a "sufficiently substantial" interest in assisting States because "the Government has offered nothing that suggests that States are in need of federal assistance," but, distinguishing *Edge*, the Court acknowledged that federal intervention can be justified to assist States in restricting broadcast advertising. 514 U.S. at 486.

rejected proposals to legalize broadcasting of casino gambling advertisements. See, *e.g.*, 134 Cong. Rec. 12,281 (1988) (Rep. Wolf); S. Rep. No. 537, 98th Cong., 2d Sess. 11-12 (1984) (Sen. Hatch).

This Court's recent decision in *Edge* confirms that Congress has a substantial interest in assisting States to "discourage public participation," 509 U.S. at 534, by their residents in activities that those States have made illegal but which are legal in other States. After noting that "Congress has, since the early 19th century, sought to assist the States in controlling lotteries," *id.* at 421, the Court held that "we are quite sure that the Government has a legitimate interest in supporting the policy of nonlottery States" (*id.* at 426). Although the Court held that the government's interest in "not interfering with the policy of States that permit lotteries" was substantial as well (*ibid.*), that holding does not undercut the conclusion that the interest in supporting non-lottery States is substantial.

To the contrary, the Court stated that "[i]n response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries." 509 U.S. at 428. Petitioners therefore err in suggesting (Br. 19) that Congress must maintain impartiality between the interests of the majority of the States that prohibit casino gambling and the minority of States that permit it. If the Constitution does not obligate Congress to remain neutral with regard to state-operated lotteries, then *a fortiori*, neither does it require neutrality in federal regulation of private casino gambling.[8]

[8] The other arguments offered by petitioners and their amici against the government's interest in assisting States that prohibit casino gambling are equally unpersuasive. The argument that the statutory exceptions undercut that interest (Pet. Br. 19; NAB Br. 12-13) has the same fatal flaws as the argument that the exceptions undercut the interest in reducing the social costs of gambling. See pp. 23-25, *supra*. And the argument that the government cannot have a legitimate interest in suppressing truthful speech about a product in order to limit consumer demand (NAB Br. 10-11; Washington Legal Foundation (WLF) Amicus Br. 3-8) is inconsistent with *Central Hudson*, *Posadas*, and *Coors*, as well as *Edge*.



## II. Section 1304 Directly Advances The Government's Interests

When a restriction on commercial speech rests on substantial governmental interests, the next question under *Central Hudson* is whether the restriction "directly advances the governmental interest[s] asserted." 447 U.S. at 566. The court of appeals correctly held that the application of Section 1304 to broadcast advertising for casino gambling directly advances both government interests in this case. Pet. App. 9a-10a, 32a-35a.

### A. Section 1304 Reduces Gambling And Its Social Costs By Prohibiting Television And Radio Advertising Of Private Casino Gambling

1. Petitioners and their amici first argue that the government cannot establish the efficacy of Section 1304 because it did not submit record evidence demonstrating, presumably in some quantitative fashion, that Section 1304 materially advances the government's interests. Pet. Br. 23-25; NAB Br. 16-20; WLF Br. 9-15; Ass'n of Nat'l Advertisers, Inc. (ANA) Amicus Br. 27. This Court has never held, however, that a specific evidentiary showing is required in all circumstances to meet the government's burden under the third component of *Central Hudson*. To be sure, "mere speculation or conjecture" will not do. *Edenfield*, 507 U.S. at 770. But the Court has nevertheless indicated that, in appropriate circumstances, commercial speech restric-

tions may be justified "solely on [the basis of] history, consensus, and 'simple common sense.'" *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995). See also *Edge*, 509 U.S. at 428 (relying on "commonsense judgment"); *Metromedia*, 453 U.S. at 509 (White, J., joined by Stewart, Marshall & Powell, JJ.) (relying on "common-sense judgments"); *id.* at 541 (Stevens, J.) (joining relevant portion of plurality opinion).

The Court has long regarded the relationship between promotional advertising and consumer demand, and the corresponding effectiveness of promotional advertising restrictions in reducing demand, as axiomatic matters that do not require specific evidentiary support. In *Central Hudson* itself, "the Court recognized * * * that there was 'an immediate connection between advertising and demand for electricity.'" *44 Liquormart*, 517 U.S. at 500 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) (quoting *Central Hudson*, 447 U.S. at 569). And in *Edge*, which involved the same statute at issue in this case, the Court accepted Congress's "commonsense judgment" regarding the link between broadcast lottery advertising and lottery participation. 509 U.S. at 428. Those who purchase or sell promotional advertising—such as petitioners and their amici—are not well positioned to suggest nonetheless that such a link may not exist.

Both in *Central Hudson* and in *Edge*, the Court has held that restrictions on promotional advertising "directly advance" the government's objective of reducing demand without requiring any evidentiary showing to confirm that commonsense proposition. *Central Hudson*, 447 U.S. at 569; *Edge*, 509 U.S. at 428, 429-430, 434. See also *Posadas*, 478 U.S. at 341-342 (noting "reasonableness" of belief that advertising restrictions will suppress demand); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997) (noting that "[g]eneric



advertising is intended to stimulate consumer demand"); *id.* at 499-500 (Souter, J., joined by the Chief Justice & Scalia, J., dissenting) (terming "unremarkable" the "presumption that advertising actually works to increase consumer demand, so that limiting advertising tends to soften it"). As the Court explained in *Edge*, "[i]f there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced." 509 U.S. at 434. That reasoning applies with equal force here. Indeed, because *Edge* involved the very statute that is at issue here, the Court's reasoning in *Edge* is necessarily dispositive in this case.[9]

The Court's repeated recognition of the connection between promotional advertising and demand reflects common, ordinary experience. And it reflects the thinking of many economists, legal scholars, scholars of advertising, and social theorists and commentators. See, *e.g.*, Mitchell et al., *Basic Economics* 116 (1951); Samuelson, *Economics* 50-51 (1992); Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65 (Nov. 1988); Pease, *The Responsibilities of American Advertising* 1 (1958); Packard, *The Hidden Persuaders* 17-19 (1980); Galbraith, *The Affluent Society* 155-156 (1958). Even economists who argue against advertising

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[9] The Court's acceptance of the connection between advertising and demand in *Edge* disposes of the attempt by NAB (Br. 17) and WLF (Br. 10-11) to write off the Court's holding in *Central Hudson* as limited to advertising by a monopolist. In any event, cabining *Central Hudson* in that fashion would not make sense. If advertising by a monopolist increases demand, then it is likely that advertising by all the producers in a competitive market will also increase overall demand, as well as help to allocate that demand.

restrictions acknowledge that a ban on advertising a product will, other things being equal, reduce consumption of the product. See, *e.g.*, Ekelund & Saurman, *Advertising and the Market Process: A Modern Economic View* 134 (1988).

2. Contrary to the claims of petitioners and their amici (Pet. Br. 23-25; WLF Br. 12-13; NAB Br. 19), the Court's intervening decision in *44 Liquormart* does not require the government to produce empirical evidence to prove in this case what the Court properly recognized as axiomatic in *Edge* and *Central Hudson*. Unlike *Central Hudson*, *Edge* and this case, *44 Liquormart* involved a prohibition on *price* advertising rather than a restriction on *promotional* advertising. In *44 Liquormart*, Rhode Island sought to defend restrictions on the advertising of retail liquor prices on the theory that the absence of price advertising would ultimately reduce liquor consumption. Rhode Island contended that advertising of price information would lead to increased price competition; greater price competition would lead to lower prices; and lower prices would stimulate higher demand. See 517 U.S. at 504-505. Four Members of the Court concluded that this attenuated series of causal links was not sufficient, in the absence of "any evidentiary support whatsoever," to establish that the advertising ban materially reduced liquor consumption. *Id.* at 505-507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.). That conclusion does not suggest, however, that an evidentiary showing is required to confirm the far more direct and obvious link between *promotional* advertising and consumption. Notably, Justice Stevens' opinion did not question the continuing authority of *Edge*, which relied on the relationship between promotional advertising and demand to hold



that the very statute at issue here satisfies the third part of *Central Hudson*.[10]

Requiring a specific evidentiary showing is particularly unwarranted where, as here, an advertising prohibition is directed at broadcast media. The Court has recognized that broadcasting is "a uniquely pervasive presence in the lives of all Americans," one that "confronts the citizen * * * not only in public, but also in the privacy of the home." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978). Broadcasting plays a uniquely powerful role in modern advertising, see Russell et al., *Kleppner's Advertising Procedure* 175 (10th ed. 1988), and restrictions on broadcast advertising are a correspondingly powerful means of affecting public demand for goods and services. For that reason, state-run lotteries spend about 90% of their advertising dollars on television and radio, and, when forced to cut their advertising budgets, have reduced print rather than broadcast advertising. See McQueen, *Penny Wise, Pound Foolish*, Int'l Gaming and Wagering Bus., Aug. 1996, at 50, 52.

Indeed, broadcast advertising is likely to be a particularly powerful force in attracting compulsive gamblers because of its "invasive" nature and ability to "take [a viewer] by surprise," *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 128 (1989), and to present "the advertiser's message in the most spectacular way possible, combining sight, sound, motion, and color" (Russell et al., *supra*, at 175). As even the Ninth

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[10] *Edge* was decided after *Edenfield*, which held that "speculation or conjecture" is insufficient to satisfy the government's burden under the third *Central Hudson* inquiry. See *Edenfield*, 507 U.S. at 770. *Edge* thus confirms that, even in the absence of an evidentiary showing, the fact that promotional advertising increases demand is more than a matter of "speculation or conjecture."

Circuit, which held Section 1304 to be unconstitutional in *Valley Broadcasting* for other reasons, acknowledged: "[b]y eliminating a potent means of persuasion, section 1304 would appear to advance directly the government's interest in discouraging public participation in commercial lotteries." 107 F.3d at 1334.[11]

3. Section 1304 also directly and materially advances the federal government's interest in assisting States that prohibit casino gambling. In the absence of Section 1304, non-casino States (such as Texas and Arkansas) would be exposed to broadcast casino advertising originating in adjacent States where casino gambling is permitted (such as Louisiana). Section 1304 entirely insulates non-casino States from broadcast casino advertising. See Pet. App. 10a. Tellingly, although petitioners argue at length that Section 1304 does not directly advance the federal government's interest in reducing the social costs of casino gambling, they make no reference at all to the effectiveness of Section 1304 in advancing the government's separate interest in assisting non-casino States.

[11] Were empirical evidence required, it would be ample. Cuts in Massachusetts' lottery advertising budget dramatically reduced what were previous large year-to-year increases in lottery sales. See McQueen, *supra*, at 52. Evidence that the government submitted in *Players Intenational, Inc.* v. *United States*, No. 98-5127 (3d Cir.), and which was not contested in that case, further demonstrates the connection between promotional advertising and gambling and its social costs, see, *e.g.*, GL 382-390 (Decl. of Robert Goodman, Executive Director, Gambling Research Institute), and the especially strong connection with respect to broadcast advertising and compulsive gamblers, see, *e.g.*, GL 391 (Goodman Decl.), 400 (Decl. of Valerie Lorenz, Executive Director, Compulsive Gambling Center, Inc.).



**B. The Statutory Exceptions Do Not Prevent Section 1304 From Directly Advancing The Government's Interests**

1. Petitioners and their amici next argue that the statutory exceptions to Section 1304 render the statutory scheme "irrational" and prevent it from advancing the government's interests. Pet. Br. 26-29; Valley Broad. Co. et al. (VBC) Amicus Br. 7-13; AGA Br. 22-25; NAB Br. 20-21; ANA Br. 28. There is nothing irrational, however, about the relationship between Section 1304 and its exceptions. To the contrary, Congress has "sensible reason[s] for drawing the line between those instances in which the government burdens First Amendment freedom in the name of the asserted interest and those in which it does not." *Wileman Bros.*, 521 US. at 493 (Souter, J., joined by the Chief Justice & Scalia, J., dissenting); see also *Metromedia*, *supra* (upholding prohibition on off-site signs even though on-site signs were permitted). In each instance, the exceptions to Section 1304 involve forms of gambling that either pose a lesser risk of social harm or offer substantial countervailing social benefits.

The principal exceptions to Section 1304 are for state-run lotteries and other government-conducted gambling (18 U.S.C. 1307(a)(1) and (2)(A)) and for Indian gambling conducted pursuant to IGRA (25 U.S.C. 2720). Those exceptions reflect an effort by the federal government to accommodate the sovereign interests of States and tribal governments that are directly engaged in the public operation of gambling activities—sovereign interests that are not implicated by private casino gambling. See, *e.g.*, S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988). The exceptions also reflect Congress's recognition that the net proceeds of state-run lotteries and Indian gambling accrue directly

to state and tribal governments and are devoted entirely to governmental purposes, but only a portion of the proceeds of private casino gambling reaches state and local governments as tax revenues.

In addition, state-run lotteries and Indian gambling are less likely to give rise to the social problems that are traditionally associated with casino gambling. For example, when Congress enacted the exception for state-run lotteries, it relied on testimony that the automated procedures used by those lotteries "operate to hinder organized criminal groups from infiltrating or stealing" from them. H.R. Rep. No. 1517, 93d Cong., 2d Sess. 6, 15-16 (1974); S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974). Moreover, state-run lotteries derive a relatively small share of their revenues from the kinds of "continuous play" games that are most conducive to compulsive gambling, but casinos depend heavily on slot machines and similar continuous-play gambling. See Christiansen, *Gambling and the American Economy*, 556 Annals Am. Acad. Pol. & Soc. Sci. 36, 39 (Mar. 1998) (Tab. 1). See also Sullivan, *By Chance a Winner: The History of Lotteries* 122-123 (1972); *NORC Report* at 60 ("[i]n only one of our [ten] case study communities did the [state] lottery seem to be a problem for a significant proportion of residents"). And though casinos operated by Indian tribes offer the same kinds of gambling as private casinos, Indian casinos are heavily regulated, see p. 6, *supra*, and the vast majority of Indian lands are located in relatively remote and sparely populated areas, see Bureau of Indian Affairs, U.S. Dep't of the Interior, *Indian Land Areas* (1992) (GL 409-421).[12] In contrast, non-Indian casinos are

[12] There are some exceptions to that general pattern, such as the Mashantucket Pequot Reservation in Connecticut, home to the Foxwoods Casino. But the validity of Section 1304 "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Edge*, 509 U.S. at 430 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)).



typically situated in or near major cities such as New Orleans, Las Vegas, Atlantic City, St. Louis, and Detroit, where far larger populations have easy access to the gambling opportunities—and the attendant problems—that they present.[13]

The remaining exceptions to Section 1304 are equally rational. The exception for charitable gambling (18 U.S.C. 1307(a)(2)(A)), like those for state-run lotteries and Indian gambling, involves gambling in which the proceeds are devoted to public purposes. Moreover, the kinds of charitable gambling activities at which this exception is directed, such as "charitable raffles" and "church bingo games" (134 Cong. Rec. 31,075 (1988)), are manifestly different in their potential social costs from the multi-billion dollar commercial casino gambling industry. The exceptions for fishing contests (18 U.S.C. 1305) and "clearly occasional and ancillary" promotional contests (18 U.S.C. 1307(a)(2)(B)), such as car dealership drawings (134 Cong. Rec. 31,075 (1988)), cover only infrequent and inconsequential forms of gambling that do not result in appreciable expenditures and pose no discernible risk to public welfare. Finally,

[13] As described above, in *Edge*, this Court recognized Congress's valid interest in accommodating the interests of States that operate lotteries. See 509 U.S. at 426. Similarly, the Court has noted the "important federal interests" in "Indian self-government" and "encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217 (1987). Given those legitimate interests, there is no merit to the argument of VBC (Br. 14-24) that the statutory scheme embodies impermissible discrimination based on the identity of the speaker.

sports betting and advertising of sports betting are subject to significant independent federal restrictions, see p. 7, *supra* (describing 28 U.S.C. 3701 *et seq.*), and the pool of legal sports bettors is significantly smaller than the pool of people who lawfully bet on games of chance. See Christiansen, *supra*, at 39 (Tab. 1) (parimutuel betting and other sports bookmaking account for less than 10% of total gross gambling revenues).

2. It is true that, taken collectively, the exceptions to Section 1304 expose the public to broadcast gambling advertising that it would not otherwise see. But that does not mean the exceptions therefore prevent Section 1304 from directly advancing the government's interests. To the contrary, *Edge* establishes that a restriction on advertising—indeed, the restriction on advertising at issue here—directly advances the government's goals as long as it substantially reduces the targeted advertising, even if it does not completely eliminate it.

In *Edge*, a North Carolina radio station that wished to broadcast advertisements for the Virginia lottery challenged the constitutionality of Section 1304 as applied to state-run lotteries. The North Carolina station argued that Section 1304 did not satisfy the direct-advancement requirement of *Central Hudson* because the station's North Carolina audience "listened to Virginia radio stations and television stations that regularly carried [Virginia] lottery ads," and "Virginia newspapers carrying such material also were available to them." 509 U.S. at 432. The station thus argued that permitting broadcast advertising in lottery States prevented the remaining restriction on advertising in non-lottery States from accomplishing its goal.

The Court acknowledged that North Carolina audiences would hear lottery advertising from Virginia stations, but held that, because Section 1304 nonetheless reduced the total amount of lottery advertising



reaching North Carolina residents, it directly advanced the goal of reducing lottery participation in non-lottery states. 509 U.S. at 432-434. In so holding, the Court stressed that "we [do not] require that the Government make progress on every front before it can make progress on any front." *Id.* at 434. And the Court emphasized that "[t]he Government may be said to advance its purpose *by substantially reducing lottery advertising, even where it is not wholly eradicated.*" *Ibid.* (emphasis added). See also *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985) ("As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied."); *Metromedia*, 453 U.S. at 511 (White, J., joined by Stewart, Marshall & Powell, JJ.) (underinclusive restriction may still advance government objectives); *id.* at 541 (Stevens, J.) (joining relevant portion of plurality opinion).

The Court's reasoning in *Edge* and similar cases applies with equal force here. Private commercial casino gambling accounts for 40% of all gross gambling revenues in the United States—a larger percentage than any other category of gambling. See Christiansen, *supra*, at 39 (Tab. 1). By closing the airwaves to commercial casinos that account for 40% of all gambling revenues in the United States, Section 1304 satisfies *Edge*'s requirement of "substantially reducing" broadcast gambling advertising. Cf. *Edge*, 509 U.S. at 432 ("applying the statutory restriction [on lottery advertising] to Edge would directly serve the statutory purpose of supporting North Carolina's antigambling policy by excluding invitations to gamble from 11% of the radio listening time" in Edge's North Carolina listening area).

Contrary to the suggestion of petitioners and amicus AGA (Pet. Br. 29; AGA Br. 24-25), the Court's reasoning regarding the efficacy of Section 1304 in *Edge* was not predicated on the fact that Congress was attempting to balance the competing interests of lottery and non-lottery States. Instead, *Edge* holds without qualification that "substantially reducing lottery advertising" directly advances "the policy of decreasing demand for gambling." 509 U.S. at 434. Even if the holding in *Edge* had depended on the fact that Congress was also accommodating the interests of non-lottery States, here Congress, as we explained above, is also accommodating those interests, as well as the interests of tribal governments. If the exceptions resulted only in the redirection of the gambling to state- and Indian-run operations, they would advance valid government interests by supporting state and tribal fiscs and channeling gambling activity to operations with greater supervision and oversight.[14]

3. Petitioners and their amici also err in arguing (Pet. Br. 26; NAB Br. 21; VBC Br. 7-13; AGA Br. 23-24; ANA Br. 28) that this Court's decision in *Coors* undercuts *Edge* and compels the conclusion that the exceptions to Section 1304 render the statute unconstitutional. *Coors* does not question the Court's reasoning in *Edge*, much less overrule that decision. As we have noted, *Coors* held that a federal statute prohibiting the disclosure of alcohol content information on beer labels failed the third part of the *Central Hudson* test because it was an "irrational[]" means of pursuing the govern-

[14] Petitioners also incorrectly assert (Br. 28) that "the advertising at issue in *Edge* proposed a transaction that was illegal in the state where it was broadcast." To the contrary, the advertising at issue in *Edge* proposed the sale of Virginia lottery tickets in Virginia, a legal transaction. See 509 U.S. at 423.



ment's proffered interest in preventing strength wars. 514 U.S. at 488-490. The outcome in *Coors* simply reflects the "irrationality of th[e] unique and puzzling regulatory framework" that the Court found before it. *Id.* at 489. In *Coors*, the Court found that Congress had locked the back door but left the front door open: although brewers could not list alcohol content on beer labels, they were free to disseminate that information to consumers through other means, including promotional advertising, "a more influential weapon in any strength war." *Id.* at 488.

Here, in contrast, Section 1304 denies commercial casinos any access to television or radio to promote their gambling activities, and related statutory provisions limit other avenues of interstate advertising (see pp. 1-3, *supra*). Although Indian casino gambling and certain other gambling activities may be advertised on television and radio, Section 1304 excludes a major portion of the gambling industry from the Nation's airwaves. Thus, unlike the statute in *Coors*, Section 1304 and its statutory exceptions cannot be characterized as a scheme the "irrationality of [which] * * * ensures that the * * * ban will fail to achieve [its] end" (514 U.S. at 489).[15]

[15] This case is also significantly different from *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). In *Discovery Network*, the Court invalidated a local ordinance that prohibited the use of sidewalk newsracks to distribute "commercial handbills" but did not extend the prohibition to the distribution of newspapers. The Court held that the ordinance did not satisfy the requirements of *Central Hudson* because "the distinction [between commercial and non-commercial publications] bears no relationship whatsoever to the particular interests that the city has asserted," and because the ordinance had "only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418, 424. Here, in contrast, the exceptions to Section 1304 involve forms of gambling

### III. Section 1304 Is Not An Impermissibly Broad Restriction On Commercial Speech

The final question under *Central Hudson* is whether Section 1304 is "not more extensive than is necessary" to serve the government interests underlying the statute. 447 U.S. at 566. That inquiry is not a "least restrictive means" test. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 477, 480 (1989); *Edge*, 509 U.S. at 429-430; *Florida Bar*, 515 U.S. at 632. Instead, the First Amendment requires only a "reasonable" fit between the regulatory means and ends. *Fox*, 492 U.S. at 480. The Court has insisted "only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 478 (internal quotation marks omitted). And the Court has "been loath to second-guess the Government's judgment to that effect." *Ibid.*[16]

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that entail fewer social costs as well as countervailing social benefits, and the exceptions do not prevent Section 1304 from substantially diminishing the amount of broadcast gambling advertising.

[16] "If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable." *44 Liquormart*, 517 U.S. at 529-530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment); *Florida Bar*, 515 U.S. at 633. Federal law does not entirely disable casinos from engaging in promotional advertising. Although Section 1304 prohibits broadcast advertising of casino gambling, and other statutory provisions restrict interstate distribution of other forms of gambling advertising (see pp. 1-3, *supra*), federal law does not generally restrict the *intra*state advertising of legal casino gambling in non-broadcast media, such as local newspapers, magazines, leaflets and billboards. The decision not to regulate those "alternative channels" of communication represents a tailoring of the federal regulatory scheme to the advertising media that pose the greatest threat to the governmental interests underlying Section 1304, while leaving open adequate channels by which casinos can convey to consumers "information as to who is



In *44 Liquormart*, this Court held that Rhode Island's ban on liquor retail price advertising was impermissibly restrictive because Rhode Island's goal of raising liquor prices could be achieved more effectively through regulatory alternatives that did not involve restrictions on commercial speech. See 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) ("perfectly obvious" that "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal"); *id.* at 530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment) ("other methods at [Rhode Island's] disposal" would "more directly" and "far more effectively" raise liquor prices).

Here, petitioners and their amici first suggest that the government could "outlaw" casino gambling altogether. Pet. Br. 32; AGA Br. 29; NAB Br. 25. But that suggestion proves too much. Within the broad limits of the Commerce Clause, Congress has the constitutional authority to prohibit virtually any commercial activity that it believes produces harmful results, other than commercial transactions involving constitutionally protected activity. State governments likewise are generally free, in the absence of countervailing federal law, to prohibit any commercial activity that they deem to be harmful to the public. As a result, to hold that outlawing disfavored commercial activity is a "less restrictive alternative" to regulating promotional advertising would be tantamount to holding that the First Amendment disables the government from restricting promotional advertising alto-

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producing what product, for what reason, and at what price." *44 Liquormart*, 517 U.S. at 496 (plurality opinion) (internal quotation marks omitted).

gether. The Court has repudiated the notion that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" (*44 Liquormart*, 517 U.S. at 510 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.) (quoting *Posadas*, 478 U.S. at 345-346)); it would be equally ill-advised for the Court to stand that maxim on its head by holding that the power to ban casino gambling categorically *excludes* the power to regulate casino advertising.

Moreover, it is by no means obvious that an outright prohibition on casino gambling would, in fact, be "more likely to achieve the [government's] goal[s]." *44 Liquormart*, 517 U.S. at 507 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.). Prohibiting a commercial activity does not necessarily mean that the activity ceases; instead, it may simply be driven underground, in the form of a black market for the proscribed product or service. As the Nation's experience during Prohibition shows, black markets may give rise to their own social costs, including greatly expanded opportunities for organized crime and other forms of criminal activity that create major enforcement burdens. Compare *id.* at 530 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ., concurring in the judgment) (regulatory alternatives to Rhode Island's advertising ban would entail "comparatively small additional administrative cost"). In the end, petitioners' hypothesized federal ban on casino gambling might well end up exacerbating, rather than diminishing, some of the problems that led to the enactment of Section 1304. And an outright nationwide ban would obviously impinge far more directly on the authority of the States to regulate gambling activity within their borders—authority that petitioners elsewhere profess to defend (see Pet. Br. 19).



Petitioners and their amici next suggest (Pet. Br. 32; AGA Br. 29; NAB Br. 25) that the government sponsor "counter-speech," such as public service announcements, informational brochures, and educational displays. It is, however, entirely speculative—rather than "perfectly obvious" (*44 Liquormart*, 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.))—that such counter-speech "would be more likely" to achieve the government's goals (*ibid.*). It is particularly improbable that counter-speech would have a meaningful impact on the problem of compulsive gambling. Compulsive gambling is an impulse control disorder; compulsive gamblers place themselves (and others) in jeopardy not because they are ignorant of the risks of gambling, but because they cannot control their behavior in the face of known risks. See American Psychiatric Ass'n, *supra*.[17] Moreover, whatever gains might otherwise be realized through counter-speech and other educational efforts could be negated if the casino industry were free to bombard susceptible persons with unrestricted television and radio advertising.

Finally, petitioners and their amici (Pet. Br. 32; AGA Br. 29; NAB Br. 25) propose that the government support various remedial programs, such as treatment programs for compulsive gamblers and "crisis and intervention services." Such services, however, are already widely available, often as part of the existing regulatory schemes of States that permit casino gambling. See, *e.g.*, La. Rev. Stat. Ann. §§ 28:841-28:842 (West Supp. 1999) (creating Compulsive and Problem Gaming Fund and establishing state-operated

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[17] The *NORC Report* cited by amicus AGA states that "a substantial proportion" of problem and pathological gamblers "believe that the overall effect of legalized gambling on society is either bad or very bad." *NORC Report* at 28.

information, referral, and treatment services for compulsive and problem gambling); N.J. Stat. Ann. §§ 5:12-145, 26:2-169 (West 1996) (state-funded treatment programs for compulsive gamblers). Those services are unquestionably important in dealing with the social costs of casino gambling. But they are a complement to Section 1304, not an alternative to it. Programs that treat compulsive gamblers and provide crisis intervention are, by necessity and design, after-the-fact services that address problems already in existence. Section 1304, in contrast, is designed to reduce the incidence of those problems prospectively, by curtailing the demand that leads to compulsive gambling and other social costs of gambling activities.[18]

## IV. If The Existing Record Is Inadequate To Resolve The Constitutionality Of Section 1304, The Case Should Be Remanded For Further Proceedings

For the reasons we have explained, we submit that this Court's commercial speech precedents such as *Central Hudson* and *Edge* permit the government to establish the constitutionality of Section 1304 without the kind of evidentiary showing that petitioners demand (Br. 13-17, 22, 24-25). If the Court nevertheless determines that the record is not sufficiently developed to justify the Fifth Circuit's affirmance of the district court's grant of summary judgment to the government,

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[18] Evidence submitted by the government in *Players International, Inc.* v. *United States*, No. 98-5127 (3d Cir.) and lodged with the Court demonstrates in more detail why the measures discussed above and other measures not raised by petitioners here are inadequate alternatives to Section 1304. See, *e.g.*, GL 401-402 (Lorenz Decl.); Arcuri et al., *Shaping Adolescent Gambling Behavior*, 20 Adolescence 935, 937-938 (Winter 1985) (GL 440-441) (large percentage of minors at Atlantic City high school gambled in casinos; identification of compulsive gamblers is difficult).



the Court should vacate the judgment and remand the case for further proceedings before the district court. See 28 U.S.C. 2106 (Court may "vacate * * * any judgment, decree, or order of a court" and "remand the cause" for "such further proceedings * * * as may be just under the circumstances").

The evidentiary record in this case was established five years ago, at a time when the continuing authority of this Court's decision in *Posadas* had not been called into question, and when the Court recently had sustained the constitutionality of Section 1304 as applied to state lottery advertising in *Edge*. In a subsequent suit involving the constitutionality of Section 1304, *Players International, Inc.* v. *United States*, No. 98-5127 (3d Cir.), which was commenced after this Court's partial repudiation of *Posadas* in *44 Liquormart*, the government presented a more extensive evidentiary submission regarding the operation and effect of Section 1304; and, as mentioned above, copies of the appendix before the court of appeals in that case have been lodged with the Court. That appendix includes declarations from experts regarding the impact of broadcast advertising on demand for casino gambling; the role of broadcast advertising in compulsive gambling behavior; the relative social costs of casino gambling and other forms of gambling; and the effectiveness of proposed regulatory alternatives to advertising restrictions. See GL 379-402.

The declarations presented in *Players* have never been considered in this case, and, although we have referenced them briefly (notes 11 & 18, *supra*) to illustrate the kind of evidence that is available, we do not urge the Court to rely on them in the first instance here. Instead, if the Court regards the existing record as incomplete because of intervening jurisprudence, the Court should remand to the district court so that the

constitutionality of Section 1304 can be resolved in light of the kind of expert evidence presented in *Players*. For the Court instead to direct a judgment in petitioners' favor on the ground that the record is inadequate to establish the constitutionality of Section 1304 as applied to petitioners would necessarily leave the underlying constitutionality of Section 1304 unresolved. Unless the Court were prepared to hold that *no* evidentiary record could sustain the constitutionality of the statute—a holding that would entail a substantial and unwarranted departure from the Court's existing commercial speech precedents—remanding for further proceedings would be the most appropriate response if the current record were found to be incomplete. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 668-674 (1994); *Storer* v. *Brown*, 415 U.S. 724, 738-746 (1974); *Askew* v. *Hargrave*, 401 U.S. 476, 478-479 (1971) (per curiam).

## CONCLUSION

The judgment of the court of appeals should be affirmed. If the Court determines that the record is insufficient to support the judgment, the judgment should be vacated and the case should be remanded for further proceedings before the district court.

Respectfully submitted.



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MARCH 1999

No. 98-0387

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit**

## REPLY BRIEF FOR PETITIONERS

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**MISCELLANEOUS**





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## REPLY BRIEF

The advertising ban challenged here is plainly invalid under *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Pt. I. But the fact that the court below nevertheless felt at liberty to uphold the ban in reliance on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), illustrates the need for a clearer line to protect consumers and commerce from unconstitutional restrictions on commercial speech. Pt. II.

### I. THE CHALLENGED REGULATORY SCHEME DOES NOT MEET THE CENTRAL HUDSON TEST.

The regulatory scheme at issue criminalizes the broadcast of truthful, non-misleading advertising of lawful games of chance. 18 U.S.C. § 1304; Gov. Br. 14. From this general prohibition, numerous exceptions have been carved, as the government concedes. Gov. Br. 43. For example, broadcast advertising is permitted in *every* state regarding:

1) Casinos on Indian lands. 25 U.S.C. § 2710(d).

2) Government casinos. 18 U.S.C. § 1307(a)(2).

3) Betting on horse races, dog races and jai alai. 28 U.S.C. § 3704(a)(4); *Elimination of Unnecessary Broadcast Regulation*, 56 Rad. Reg. 2d (P&F) 976 (1984) (*Broadcast*).

4) Poker tournaments. *Letter to Calnevar Broadcasting, Inc.*, 8 F.C.C.R. 32 (1992).

State lotteries may also be advertised in all 37 states that conduct lotteries. *See* 18 U.S.C. § 1307(a)(1); Wendy Melillo, *Lottery Ad Standards Urged*, Adweek (Mar. 22, 1999).

Even with respect to the gambling primarily covered by the ban, commercial casinos owned by private companies, the law does not ban all advertising. In *every* state, these casinos may advertise that they provide "Vegas-style excitement," if they are a multi-use establishment. *In re WTMJ*, Inc., 8 F.C.C.R. 4354

(1993). And they may include the word "casino" if it is in the establishment's name, even though the government recognizes this is promotional advertising. *Letter to DR Partners*, 8 F.C.C.R. 44, 44 (1992). These casinos may not, however, advertise which games they offer or their payouts, information potential customers could use to choose among casinos.

Despite the government's effort to identify interests to justify these Swiss cheese rules, the "overall irrationality of the Government's regulatory scheme" undermines every interest the government claims. *Coors*, 514 U.S. at 488. Further, the government impermissibly chose to ban speech, without even considering the numerous direct regulations that would as effectively advance its interests as the First Amendment requires. *See Coors*, 514 U.S. at 491.[1]

### A. The Government Has Not Shown, and Cannot Show, That Its Regulatory Scheme Advances Its Asserted Interests to a Material Degree.

***1. The scheme does not materially assist states that prohibit gambling.*** The government's claim that its scheme helps states that prohibit gambling protect their own residents by preventing broadcast advertising "spillover" from stations licensed elsewhere, Gov. Br. 29, is fatally undermined by the advertising it permits. For example, the government has not protected states from spillover of state lottery advertising, which it permits to spill over from any of the 37 states that conduct lotteries. The government has also not "assisted" any

[1] Contrary to the government's suggestion, the scheme challenged here has not been reviewed, much less upheld, by this Court. The only lower court to uphold it is the court below. *Cf. Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997) (holding ban invalid), *cert. denied*, 118 S. Ct. 1050 (1998); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997) (same), *cert. denied*, 119 S. Ct. 852 (1999).



states to shield their residents from advertising for betting on horses, or jai alai, or poker tournaments, or gambling operated by charities or as commercial promotions. To the contrary, the government permits advertising for these types of gambling to be broadcast both as spillover from other states and from *inside the states alleged to need help protecting residents from such speech*. Moreover, the number of states that may want such assistance has dwindled almost to nothing. Only two states have not legalized some form of gambling. Deirdre Shesgreen, *Stacked Deck*, Legal Times 1, 4 (Mar. 29, 1999).

The government's attempt to avoid these devastating facts by recharacterizing its interest as assisting states that prohibit *casino* gambling, Gov. Br. 28, is equally flawed. The statutory scheme *permits* broadcast advertising for casino gambling, not only from other states, but from *inside* the very states the government purports to assist -- if the advertised casino is controlled by a government entity or Indian tribe. Thus, Delaware, Rhode Island, West Virginia, and South Dakota may advertise their video poker, blackjack, keno and other casino-type games on any station in the country. *See* W. Va. Code § 29-22A-4 (1998); R.I. Gen. Laws § 42-61.2-2(a) (1998); Del. Code Ann. tit. 29, §§ 4801, 4820 (1998); S.D. Codified Laws § 42-7A-4 (1998). The "assistance" provided to states that prohibit *all* types of gambling is to permit advertising about these slot machines, video black jack and other casino-type games to be broadcast to their residents, without restriction.

Likewise, casinos operated on Indian land may advertise in *every* state, regardless of the state's policies on casino or any other type of gambling. This is a huge "exception." In 1997, there were 115 tribes with at least one casino operation each. <www.dgsys.com/~niga/stats.html>. Those known to advertise on television and radio included casinos near Phoenix, Portland, Minneapolis, Sacramento, Albuquerque and in New York State

and Connecticut. Gov. Lodging 435-37. Thus in Texas, the very state the court below "protected" from spillover advertising, Pet. App. 10a, federal law permits the Speaking Rock Casino near El Paso, and Indian casinos in Louisiana and other states, to advertise from stations inside Texas itself.[2]

Indeed, the government has aggressively forced states to accept the operation and advertising of Indian casinos within their own borders, which "makes no rational sense if the Government's true aim is to" assist anti-gambling states to protect their residents from such gambling. *Coors*, 514 U.S. at 488. The Indian Gaming Regulatory Act (IGRA), enacted not only to regulate but also to *promote* the development of Indian casinos, requires states to permit Indian casinos if they permit any casino-type gambling for any purpose by any person. 25 U.S.C. § 2710(d)(1)(B).[3] The federal government has forced anti-gambling states that permit occasional "casino night" charity functions to accept Indian commercial casinos within their boundaries, advertising to their residents -- as well as advertising by Indian casinos operating in other states. Even in North Carolina, the state protected in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), from in-state advertising of Virginia's lottery, the casino Harrah's operates on Indian land in North Carolina may freely advertise from in-state stations. <www.harrahs.com/tour/tour_index.html>.

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[2] Federal law also permits Texas' racetracks to advertise their horse or dog racing, simulcast wagering, and wagering windows. Texas has seven horse racetracks and three dog tracks. *See* <txrc6.txrc.state.tx.us/tracks.html>. All web sites cited in this brief were visited March 28-31, 1999.

[3] The federal law that excepted Indian casinos from the advertising ban, also "authorized casino gaming on Native American lands in approximately 31 states." Eugene M. Christiansen, *Gambling and the American Economy*, 556 Annals Am. Acad. Polit. & Soc. Sci. 36, 38 (1998) (*Christiansen*).



These contradictory provisions ensure "[t]here is little chance [the scheme] can directly and materially advance its aim" of helping states keep their residents ignorant of casino gambling. *Coors*, 514 U.S. at 489.

***2. The scheme cannot materially reduce any social costs of gambling.*** The government also claims that its prohibition reduces social costs of gambling, Gov. Br. 31, but that claim is similarly unpersuasive and is completely undermined by the regulatory scheme's massive contradictions. For example, the materials submitted by the government regarding compulsive gambling emphasize that what attracts compulsive gamblers and others is the excitement generated by casinos. *See, e.g.*, Gov. Lodging 399-400 ("Casino addicts . . . are attracted to the fantasy atmosphere, the excitement, the special treatment, and the incentives offered"); *id.* at 236 ("[e]xcitement plays a large role in motivating people to gamble"). Yet private casinos are *permitted* to advertise these very qualities. Advertising may associate the word "casino," if (as is common) it is in the advertiser's proper name, with fantasy atmosphere, excitement, special treatment and incentives such as shows, drinks, food, and luxury hotel rooms. *See In re WTMJ*, 8 F.C.C.R. at 4354. Casinos are even permitted to attract potential customers with such double entendre teasers as: "The odds for fun are high at Harrah's."[4]

"If combating [compulsive gambling] were the goal," one "would assume that Congress would regulate" the advertising

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[4] Another permitted commercial shows a man in an old chair, with a voice-over, saying: "The no-win vacation . . . [i]t's not happening here" and then switches to a happy crowd scene, with a voice-over saying: "It's happening at Harrah's. You can have a winning vacation here." Letter to Forbes W. Blair (Mass Media Bureau, Apr. 24, 1987) (explaining that § 1304 would not prohibit these broadcast spots) (attached to Gov. Mot. for Summ. J. below)(E.D. La., filed June 14, 1994).

most likely to attract such gamblers. *Coors*, 514 U.S. at 489. Instead, federal law *permits* that advertising, but prohibits advertising that could help those inclined to gamble make economically rational choices among potential vendors, such as advertising promoting more generous payouts than offered by competitors. Prohibiting this type of advertising just keeps all gamblers' costs higher by discouraging payout (*i.e.*, price) competition. The government makes *no* attempt to justify this inexplicable line.[5]

The government's regulatory scheme also permits advertising of most other types of gambling, including identical casino gaming operations controlled by a government or Indian tribe. *Cf. Coors*, 514 U.S. at 488. The government concedes that the same types of gambling are available at casinos that may advertise freely as at casinos that may not. Gov. Br. 38.[6]

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[5] What the government does try to justify is the broader ban on broadcast advertising than on print advertising, asserting that broadcast advertising presents a far greater danger of social costs. Gov. Br. 35. That assertion, however, is at odds with the provisions themselves, which impose ***harsher*** penalties for violating the ban on mailing print advertising (up to two years in prison for a first offense, up to five years for subsequent ones) than for violating the ban on broadcast advertising (one year maximum whether first or subsequent offense). *Compare* 18 U.S.C. § 1302 *with* § 1304.

[6] Thus, Delaware boasts of "the closest slot facility to the Delaware beaches . . . the most fun you've had since you were a kid," a "Las Vegas-style facility," the "thrill of over 1000 slot machines." *See* <www.doverdowns.com/slots> and <www.state.de.us/tourism/attrkent.htm>. West Virginia claims its "gaming rooms will electrify your sense of anticipation," "the action will accelerate and exhilarate you," that "winning is just a play away!" and that you will "find your fortune" by playing its gaming machines and betting on horse races. Players also receive free cocktails while playing the machines. *See* <www.ctownraces.com/slots/index.html>, <www.mtrgaming.com/gaming.html>, <www.wheelingdowns.com/slots.htm>. Maryland advertises its keno games as available "in many of your favorite social gathering spots -- restaurants, taverns, bowling alleys" and as "a fun, fast-paced game that can be enjoyed alone or with friends," with a new game available "every five minutes." *See* <www.msla.state.md.us/keno.html>. All these claims may also lawfully be made in broadcast advertising.



Moreover, no clear line exists between government or Indian casino gaming and private casinos even in terms of management or ownership. According to the Delaware Lottery, for example, the slot machines Delaware controls are not owned by the State; they are owned by slot machine vendors and *leased* to the State. Delaware, in turn, contracts with the *privately-owned* facilities where it places the slot machines, such as Harrington Raceway and Dover Downs, to actually operate and advertise the machines as the State's agents. Rhode Island undertook casino-type electronic gaming when its private racetracks were threatened by competition from racetracks and Indian casinos in other states. Had Rhode Island simply authorized those racetracks to offer video poker and slot machine games, imposing whatever regulations and tax it chose, the racetracks would have been prohibited by federal law from using broadcast advertisements to compete. Accordingly, the legislature authorized the state lottery commission to "provide" video gaming machines at those tracks. The private racetracks operate and advertise the gaming, and keep 31% of the revenue. *See* <www.trackinfo.com/li/li_hist.html>. Because Rhode Island could exercise the same control by regulation as it does by contract, the sharp distinction between gaming that is regulated by a state and gaming that is "conducted" by a state does not further the government's asserted interests.

Similarly, federal law does not require casinos on Indian lands to be operated by tribes. The same companies that operate private casinos may, under contract with a tribe, build, operate, and keep up to 30 to 40% of the net revenues of casinos on Indian land. 25 U.S.C. §§ 2710(d)(9), 2711(c). Harrah's, for example, a private casino company in Atlantic

City, Las Vegas and Reno, operates the Phoenix Ak-Chin casino and several others for tribes, and advertises them on television and radio. *See* <www.nigc.gov/contracts.html>; Gov. Lodging 435-36. The largest casino resorts in Louisiana, Grand Casino Avoyelles and Grand Casino Coushatta, are operated by a subsidiary of the world's largest private casino company, Park Place Entertainment. Because they are on Indian land, both can, and do, advertise on television and radio. *See* Gov. Lodging 435; Park Place Entertainment Corp. 8-K Filing (filed Feb. 5. 1999). These same companies, however, are prohibited from broadcasting even informational advertising about the identical gaming they operate on non-Indian land.

The government's attempt to justify the differential treatment of gaming activities that can and cannot be advertised on the ground that those banned from broadcast advertising impose greater social costs, is not even supported by the government's own "evidence," much less by common sense. For example, the government argues that state lotteries present little risk of infiltration by organized criminal groups, Gov. Br. 38, without even trying to reconcile this argument with the scheme's acceptance of horse and dog racing, even though these *have* in the past been associated with organized crime. Its sole explanation for why advertisements of horse racing are permitted, notwithstanding any social costs associated with "betting on the ponies," is that fewer people bet on races than go to casinos. *Id.* at 40. Yet, having suggested that the size of the audience is the defining issue, the government then provides no explanation for why advertising of the types of gaming that account for approximately 60% of the country's gambling revenues is permitted under the federal scheme. *See* Gov. Br. 40-41; *Christiansen* at 39.

The government's attempt to distinguish between permitted and prohibited advertising on the basis of a link between the



activity advertised and compulsive gambling is equally unpersuasive. The government suggests that state lotteries do not attract compulsive gamblers because they do not involve "continuous play" games. Gov. Br. 38. But the government's own materials contend there are state lottery addicts. *See* Gov. Lodging 399; *see also* Charles T. Clotfelter, *et al.*, Duke University Report to the National Gambling Impact Study Commission 16 (1999) (5% of state lottery players account for 54% of the nation's lottery sales). Further, the government's materials indicate that the aspects of state lotteries that attract lottery addicts are their low cost and easy access. Gov. Lodging 399. Yet the federal scheme permits state lotteries to advertise exactly these qualities -- regardless of the impact on compulsive gamblers. Other gaming the government finds to be associated with compulsive gambling may also be advertised on television and radio. *See* Gov. Lodging 283 (jai alai associated with increased incidence of Gamblers Anonymous chapters).[7]

In addition, the government has asserted other social costs of gambling that it neglects to mention in discussing state lotteries, possibly because lotteries are much more likely to entail those costs than is the gambling subject to the ban: *e.g.*, a regressive tax on the poor, and false but sometimes irresistible hope of financial advancement. Gov. Br. 15-16; Gov. Lodging 243 (study finding those in $15,000 to $30,000 income range constitute 66% of lottery players, 44% of bingo players, but only 24% of casino players).

Critically, the government is unable to point to *any*

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[7] The government's claim that lotteries cause less harm is also in tension with the provisions themselves. Congress imposed a *partial* ban on broadcast advertising of state *lotteries* -- advertising permitted only in states that conduct lotteries -- but *no* ban on broadcast advertising of state or Indian *casino* gaming. *Cf.* 18 U.S.C. § 1307(a)(1) and § 1307(a)(2). Thus, a state may advertise its own casino gaming in every state, but its lottery only in some.

distinction between the casinos that may freely advertise and those that may not that could justify the government's speech restriction. Its attempt to argue that Indian casinos impose lower social costs than private casinos is based solely on the existence of federal regulation and the location of Indian casinos in allegedly more remote areas. Gov. Br. 38. These factual claims are questionable, but more important, the argument misapplies the law. If, as the government suggests, social costs engendered by casino gambling can be lowered to an acceptable level with non-speech regulation, including regulation of the location of casinos, the existence of these effective non-speech alternatives *precludes* the government from imposing a ban on commercial speech.[8] *44 Liquormart*, 517 U.S. at 507 (Stevens, J.); *id.* at 529 (O'Connor, J.).

The government's reliance on *Edge* to save its Swiss cheese scheme is misplaced. The regulation upheld in *Edge*, despite its limited impact in the particular instance before the Court, was entirely consistent with the government's then-asserted interest in assisting states that conduct lotteries to promote them and assisting states that prohibit lotteries to prohibit advertising of lotteries within their borders. *See* 509 U.S. at 428 ("This congressional policy of balancing the interests of lottery and non-lottery States is the substantial

[8] As a factual matter, the government's intimation that private casinos are not heavily regulated is mistaken, and its assertion that private casinos are in big cities and Indian casinos are remote is open to dispute. South Dakota's private casinos, for example, are remote, and many Indian casinos are close to population centers. *See* Gov. Lodging 435-36. More to the point, casinos attract patrons from afar, a factor the government itself relied on in enacting the IGRA to further "tribal economic development." 25 U.S.C. § 2702(1). That goal was not premised on anticipated gambling by Indians living nearby. It was premised on gambling by large numbers of visitors, and was based on experience with private casinos in places such as Las Vegas which, despite their location in a remote desert, have successfully attracted visitors.



governmental interest that satisfies *Central Hudson*").

Here, however, as in *Coors*, the interests the government now asserts are undermined not by geographic happenstance, but by provisions the government itself enacted. While the scheme bans broadcast advertising about private casino gaming, "it allows the exact opposite in the case of" state, local, and Indian casino gaming, betting on horse and dog races, jai alai, state lotteries, and many other gambling activities. *Coors*, 514 U.S. at 488. Moreover, the government permits even private casinos to advertise the very qualities of fantasy and excitement most likely to attract gamblers, especially compulsive gamblers. As in *Coors*, "the irrationality of this unique and puzzling regulatory framework ensures that the [ban on advertising] will fail to achieve" the government's asserted interests. *Id.* at 489.

Moreover, even if the government's scheme were *not* "pockmarked with exceptions and buffeted by countervailing state policies," Pet. App. 40a, its reliance on an "axiomatic" link between promotional advertising and demand here, Gov. Br. 34, is questionable. The government has not asserted an interest in reducing consumer demand for gambling *generally*, or even the demand for casino gambling. The interest it asserts is in reducing social costs of gambling, costs the government does not contend are evenly associated with all gambling, or with all casino gambling. Most of the social costs it identifies are associated with the 1.1% of the population, *id.* at 16, the government identifies as compulsive gamblers: addiction, harm to families, street and white collar crime. *See id.* at 18; Gov. Lodging 385-89, 401.[9] Another social cost it identifies --

[9] This alone makes clear that the ban "lacks the precision the First Amendment requires" because it substantially abridges the speech rights of the vast majority to protect the few. *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73

gambling as a regressive tax on the poor -- is implicated only when the poor gamble, not when people of means gamble. Gov. Br. 15-16. And organized crime is implicated only if gaming operations are infiltrated by organized crime groups.

Thus, even assuming *arguendo* that the prohibited advertising would materially affect overall demand, rather than market share,[10] this is not the link the government needs to prove. The links necessarily posited here are that advertising showing specific games in private casinos, or providing information about practices such as payout percentages, will lead to material increases in compulsive gambling, gambling by the poor, and infiltration of gambling operations by organized crime. The links posited by the government here, therefore, are at least as attenuated as the link between price advertising and demand asserted in *44 Liquormart* that *no* member of this Court found "axiomatic." The publications the government cites and the materials it lodged also fall woefully short of establishing the links it posits. Instead, those materials suggest that social costs of gambling increase when gambling is *legalized*, Gov. Br. 24-

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(1983) ("the government may not reduce the adult population to reading only what is fit for children")(citation omitted); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (same); *Roth v. United States*, 354 U.S. 476, 488-89 (1957) (rejecting as "unconstitutionally restrictive" a test for obscenity that focused on the material's effect on "the most susceptible persons" in the community). Moreover, because of its numerous exceptions, the ban here at best "provides only the most limited incremental support," even with respect to those few, and that is insufficient to justify such a ban. *Bolger*, 463 U.S. at 73.

[10]But such assumptions are exactly what this Court has found insufficient. *See, e.g., 44 Liquormart*, 517 U.S. at 531 (O'Connor, J.). Indeed, they would vitiate the third prong of the *Central Hudson* test because government could almost always identify a problem with a product or service and *assume* that its advertising restriction would advance its interests by decreasing demand.



25 -- a factor the government's prohibition does not affect.[11]

The government's final attempt to defend the statutory scheme mirrors Cincinnati's in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The government argues that it can ban certain private casino advertising while permitting Indian and government casino advertising because private casino gaming has less social value since its revenues do not accrue directly to governmental purposes. Gov. Br. 37-38. *Cf. Discovery Network*, 507 U.S. at 428 (ban on commercial handbills but not on newspapers defended on the ground that handbills have a lower value than newspapers).[12] This argument cannot justify the ban for two reasons. First, a distinction based on who receives revenues, like the distinction rejected in *Discovery Network*, "has absolutely no bearing on the interests [the government] has asserted." *Id.*

Second, the claimed distinction is illusory. Rhode Island receives 46% of the revenues its privately-operated casino games generate. *See* <www.trackinfo.com/li/li_hist.html>. Rhode Island could achieve the same result by authorizing the same company to offer the same casino gaming, under the same conditions, and imposing a 46% gross receipts tax. Thus, contrary to the government's argument, the amount of revenues devoted to governmental purposes is not determined by who

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[11]*Cf.* American Gaming Ass'n Br. at 7-22; Nat'l Ass'n of Broadcasters, *et al.*, Br. at 5, 15-20. One government affidavit suggests state lottery addicts blame advertising for their problems, Gov. Lodging 400. But even accepting such rationalizations at face value, that "evidence" undermines the government because its scheme *permits* advertising of state lotteries.

[12] The government does not claim that revenues from gambling on horse or dog races, or jai alai, accrue directly to governments.

controls the gaming.[13] Furthermore, the federal government could itself imose a tax and provide the proceeds to states or tribes. Because the sovereigns at issue have taxing powers, no sensible distinction can be based on the ownership of gaming revenues -- even if ownership *were* related to the interests the government asserts to justify the ban.[14]

This contradictory statute makes another distinction the government does not even attempt to justify: a distinction between so-called games of skill and games of chance. Section 1304's advertising ban applies only to games of chance, not to betting on the outcome of games of "skill." Thus, the implementing agency excludes winner-take-all poker tournaments from the advertising ban on the ground that a poker *tournament* is primarily a game of skill, but applies the ban to video poker and casino poker, which it considers games of chance. *See Calnevar Broad.*, 8 F.C.C.R. at 32.[15] Wholly

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[13] Nor does it follow that a governmental entity would receive more revenues if it operated the casino gaming directly, as long experience with government outsourcing has proven. Private companies often perform functions so much more effectively than government that they can provide a better financial result for the government, and still keep a portion as profit.

[14] In addition, the statute's incentive to governments to provide casino gaming themselves (so it can be advertised) instead of strictly regulating and taxing private casinos, is especially peculiar if the government is concerned that permitting advertising implies endorsement because, if true, advertising by *governments* necessarily sends an even stronger message of endorsement.

[15] The scheme also expressly permits advertising involving "bets or wagers on sporting events or contests," 18 U.S.C. § 1307(d), *see also* 47 C.F.R. § 73.1211(d)(1). A separate provision now prohibits operation and advertising of gambling on certain sporting events. 28 U.S.C. § 3702. But sports gambling not unlawful under that provision, *e.g.*, betting on horse races, jai alai, and certain grandfathered sports betting, may be advertised notwithstanding § 1304's ban because these are considered games of skill.



apart from whether this makes any sense as a definitional matter, the distinction between these types of gambling bears no relationship to the interests the government asserts to defend the ban. Absent any connection between the government's asserted interests and critical distinctions drawn by its regulatory scheme, it is clear the government has not, and cannot, establish "the 'fit' between its goals and its chosen means that is required." *Discovery Network*, 507 U.S. at 428.

### B. The Government Could Use Any of Numerous More Effective Non-Speech Alternatives.

The regulatory scheme also runs afoul of this Court's clear directive that governments may not restrict speech when direct regulation would be effective. *44 Liquormart*, 517 U.S. at 530 (O'Connor, J.); *Coors*, 514 U.S. at 491. Here, the government has a choice of direct regulations that would *more* effectively reduce any social costs of private casino gambling and assist states that prohibit private casino gambling, than does the advertising ban. The government itself asserts it has the power to directly regulate casino gambling. Gov. Br. 22-23. Thus, it could, for example, prohibit private casinos. Based on its own "evidence" linking increased compulsive gambling to expanded *availability* of legalized gambling, reducing that availability should be its first choice for reducing compulsive gambling. *Id.* at 17. Unlike Puerto Rico, which claimed an interest in *Posadas* in exploiting visitors while shielding its own residents, the federal government has not asserted any interest in keeping *private* casinos open.

Regulating the conduct, rather than the speech, is not impractical; it is precisely the approach the government has taken with respect to sports betting. Betting on sports events and athletic performances that are considered harmful may not be authorized, licensed, operated, sponsored, or advertised. 28 U.S.C. § 3702. The government has not suggested that its

experience with prohibiting sports betting casts doubt on the effectiveness of direct regulation of private casino gaming. And its allusion to prohibitions that led to black markets and enforcement burdens, Gov. Br. 46, fails to acknowledge that the prohibition at issue would be of private casino gaming only, not a complete prohibition of gambling. As the government itself recognizes: "the widespread growth of legalized gambling throughout the country in recent years acts as a strong counter-force to illegal gambling by providing alternative, legal opportunities for gambling." *Broadcast*, 56 Rad. Reg. 2d at 984. Moreover, it would be even easier to enforce a ban on private casino gambling than a ban on sports betting, a ban Congress has already determined presents no untoward enforcement difficulties.[16]

There are many other non-speech regulations that could more effectively reduce the asserted social costs of private casino gambling. The government could impose play or credit limits, or prohibit credit altogether, or impose admission controls or a substantial admission charge to discourage those without considerable discretionary income from pursuing this type of entertainment. The amount each person could gamble could be limited, either by an absolute maximum per player or based on income. This could be enforced by requiring bets to be made with pre-paid cards and cards to be obtained from the government. In other words, as the principal opinion in *44 Liquormart* recognized, "[p]er capita purchases could be limited as is the case with prescription drugs." 517 U.S. at 507.

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[16] The government's professed concern that banning private casino gambling would impinge on state authority, Gov. Br. 46, is hypocritical. The *current* scheme impinges on state authority by imposing its ban in states that encourage private casinos as a means of attracting tourists and raising tax revenues, such as Louisiana. *Players Int'l*, 988 F. Supp. at 503.



Interestingly, the government's own "evidence" suggests several Indian tribes have been successful in curbing compulsive gambling through similar measures. Gov. Lodging 294-95 (measures include prohibiting betting on credit or borrowing, limiting gambling to surplus property, and placing limits on the amount bet). In any event, the government itself claims that the far less strict federal regulations currently imposed on Indian casinos, in combination with location, reduce social costs to an acceptable level. Gov. Br. 37.

### C. Remand Would Serve No Purpose Here.

The government's plea for yet another chance to defend this statutory scheme should be rejected. No amount of evidence can untangle the scheme's inherently contradictory provisions, and certainly not the materials on which the government rests its request for remand.[17] The regulatory scheme's own provisions undermine the government's asserted goals in every imaginable manner, or bear no relationship to those goals whatsoever. Numerous non-speech alternatives would serve the government's asserted interests at least as well, if not far better. Remand would therefore serve no purpose.

Nor has the government been caught unawares by a change in the law after its evidentiary record was already established, as it claims. Gov. Br. 49. The government had an adequate opportunity on remand, after *44 Liquormart*, to move to

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[17] The lodged material the government claims justifies the statutory scheme is aimed almost entirely at supporting the substantiality of the government's interests. Much of it *contradicts* the government's assertions with respect to the more difficult third and fourth prongs of the *Central Hudson* test, as discussed above. And that evidence failed to satisfy the court to which it was submitted. *See Players Int'l*, 988 F. Supp. at 506-07 (finding "no evidentiary support" that the ban "will significantly reduce gambling addiction or violence," and finding the ban "more extensive than necessary").

supplement the record before the Court of Appeals or to remand for a further evidentiary proceeding. It did neither.

## II. GOVERNMENT-ENFORCED IGNORANCE IS PRESUMPTIVELY UNCONSTITUTIONAL.

The decision below, relying heavily on the language and rationale of *Posadas*, illustrates the need for a rule stating clearly that government may not ban commercial speech based on the assumption that people cannot be trusted with truthful information about lawful activities. The restriction challenged here seeks to manipulate the choices of potential consumers by denying them information about entirely lawful leisure activities. To that end, it deprives them of useful facts, such as payout percentages, that would help them make economically rational choices among casinos. It also discourages "price" competition and innovations by private casinos that could benefit consumers, by prohibiting advertising of those benefits. Further, it hides the government's policy from public view. *See 44 Liquormart*, 517 U.S. at 509 (Stevens, J.) (noting that *Posadas*' "advertising ban served to shield the State's anti-gambling policy from the public scrutiny that more direct, non-speech regulation would draw").

It has been increasingly recognized by this Court that enforced ignorance is antithetical to the First Amendment principles that require protection of commercial speech in the first place. The government simply has no legitimate basis for regulating in order to "keep would-be recipients of the speech in the dark." *44 Liquormart*, 517 U.S. at 523 (Thomas, J., concurring); *see also id.* at 503 (Stevens, J.) (noting that such bans "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth"); *cf. id.* at 517 (Scalia, J., concurring) (sharing the "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them").



In this Court's first full discussion of the First Amendment's protection of commercial speech, it held that "the First Amendment makes for us" the choice between the "paternalistic" approach of protecting people from speech, and the assumption that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). Since *Virginia Pharmacy*, this Court has repeatedly held unconstitutional speech restrictions that "rest[] in large measure on the advantages of [citizens'] being kept in ignorance." *Id.* at 769-70. *See, e.g., Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977) (rejecting signage prohibition premised on fear that "disclosure would cause the recipients of the information to act 'irrationally'"); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) ("we view as dubious any justification that is based on the benefits of public ignorance"). Indeed, the only case in which the Court upheld a restriction adopted to keep the public ignorant about lawful activities is *Posadas*, a decision that has already been effectively abandoned by this Court.[18]

This Court should unambiguously reaffirm that *Virginia Pharmacy* correctly rejected government justifications resting on the premise that it is legitimate to keep citizens ignorant of lawful options. Such a ruling is needed to prevent the mischief

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[18] *See Coors*, 514 U.S. at 482 n.2 (rejecting *Posadas*' "vice" and "greater includes the lesser" rationales); *44 Liquormart*, 517 U.S. at 509 ("*Posadas* erroneously performed the First Amendment analysis") (Stevens, J.); *id.* at 531 (noting *Posadas*' deferential approach has not been followed in subsequent case law) (O'Connor, J.). *Edge*, unlike *Posadas*, involved advertising of an activity that was illegal in the state where it would have been advertised. 509 U.S. at 423.

encouraged by the lingering specter of *Posadas*, pointedly illustrated by the decision below. Government restrictions on the flow of accurate information to the public should be deemed inconsistent with the First Amendment's premise that more information is preferable to less, and that liberty is threatened when government decides what information is available to its citizens. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented."). The advertising ban at issue provides an appropriate vehicle for this Court to make clear that the First Amendment presumptively precludes laws that advance government interests by enforcing ignorance.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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April 12, 1999

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(5)

No. 98-387



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF AMICUS CURIAE FOR THE AMERICAN GAMING ASSOCIATION IN SUPPORT OF PETITIONERS

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*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF AMICUS CURIAE FOR THE AMERICAN GAMING ASSOCIATION IN SUPPORT OF PETITIONERS

### STATEMENT OF INTEREST OF AMICUS CURIAE

The American Gaming Association ("AGA") was founded in 1995 to represent the gaming-entertainment industry by addressing regulatory, legislative, and educational issues.[1] Its mission is to develop a comprehensive gaming-entertainment industry information database and to serve as a clearinghouse for information, to design educational and advocacy programs concerning casino

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. S. Ct. Rule 37.6. The brief is filed with consent of the parties, and copies of the consent letters have been filed with the Clerk.

gaming, and to provide leadership in addressing industry issues of public concern.

This case will have a direct and substantial impact on the AGA and its members in the gaming-entertainment industry by determining whether the government may continue to suppress the broadcast of casino gaming advertisements. Neither petitioner nor the other amici, however, represent the gaming interests that will be affected by the Court's decision in this significant First Amendment case. The AGA can provide this Court with an essential perspective on the effect and implications of continuing to ban the broadcast of casino gaming advertisements that would otherwise not be available to the Court.

The AGA also has a particular interest in ensuring that unsupported assumptions about casino gaming do not infect the record in this case. The government submitted no evidence to the District Court or the Fifth Circuit to document the social and economic impacts of casino gaming, *see* Opp. at 18, but it has submitted a three-volume lodging to this Court containing materials it filed in *Players Int'l, Inc.* v. *United States*, 988 F. Supp. 497 (D.N.J. 1997), *appeal docketed*, Nos. 98-5127 & 98-5242 (3d Cir. Feb. 26, 1998). The evidence in the government's lodging is outdated, factually incorrect, and unsubstantiated, and the AGA is concerned that the Court may rely on the government's invalid studies in the absence of any contrary views. The AGA therefore offers this Court an overview of the more current and reliable studies on the social and economic impacts of the commercial casino industry. This overview demonstrates that the government has not carried its burden of justifying a law that "seek[s] to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 503 (1996) (Stevens, J.).

## SUMMARY OF ARGUMENT

The Fifth Circuit's holding in this case violates the fundamental principle that the government may not em-



ploy unsubstantiated assertions and unreliable evidence to justify the suppression of truthful, non-misleading commercial speech. This Court's First Amendment jurisprudence establishes that the government may only restrict protected commercial speech when necessary to directly advance substantial interests.

Here, however, the government has relied on "junk social science" and a federal scheme riddled with exceptions to defend its suppression of broadcast advertisements for commercial casino gaming. In particular, the government has failed to produce adequate information to show that reducing participation in casino gaming constitutes a substantial governmental interest. Moreover, even if the government had the evidence to prove such an interest, the means it has chosen to further that interest cannot survive constitutional scrutiny. The government has failed to demonstrate that the advertising ban directly advances the interests it asserts. And it has failed to establish that the ban is proportional, narrowly tailored, and no more restrictive than required. This Court should therefore hold that the federal restriction on the broadcast of casino gaming advertisements is unconstitutional.

## ARGUMENT

The federal prohibition on broadcast advertisements for "any lottery, gift enterprise, or similar scheme," 18 U.S.C. § 1304, violates the First Amendment and cannot be upheld on the basis of the Fifth Circuit's invalid and unsupported assumptions concerning the perceived dangers of commercial casino gaming.[2] That court upheld the constitutionality of 18 U.S.C. § 1304 under the four-part test first articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 566 (1980). *See* Pet. App. 2a. At least one member of this Court has disavowed *Central Hudson*, *see 44 Liquormart*, 517

[2] Section 1304 bans only the depiction of casino gaming activities; it does not proscribe advertisements which highlight other features of the gaming-entertainment industry, such as food, concerts, etc.

U.S. at 518 (Thomas, J., concurring), and other amici here urge the Court to abandon *Central Hudson* in favor of strict scrutiny. *See* Br. Amicus Curiae for the Association of National Advertisers. The AGA supports these efforts and believes that content-based restrictions on truthful, non-misleading commercial speech should be subject to the same First Amendment analysis applied to non-commercial speech. The statute at issue, however, cannot withstand even the more lenient constitutional inquiry established in *Central Hudson*; we therefore analyze the case under those principles.

The *Central Hudson* inquiry proceeds in four steps:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. [447 U.S. at 566.]

The first prong of the test—whether the commercial speech is lawful and not misleading—is not in dispute. The government conceded below that petitioners seek only to broadcast truthful advertising about legal casino gaming activities. *See* Pet. App. 28a. The Fifth Circuit's decision to sustain § 1304 under the remaining three factors was, however, misguided. The government has not met its burden to marshal credible evidence in support of its proffered interests, and the numerous exceptions to the federal scheme, in concert with the availability of less speech-restrictive alternatives, render the statute unconstitutional under any reading of the protections afforded to commercial speech.



## I. THE GOVERNMENT HAS ASSERTED NO SUBSTANTIAL INTEREST SUFFICIENT TO SUSTAIN A BAN ON THE BROADCAST OF CASINO GAMING ADVERTISEMENTS.

The second prong of the *Central Hudson* test requires the government to "assert a substantial interest to be achieved by restrictions on commercial speech." 447 U.S. at 564. This burden cannot be "satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real." *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993); *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624 (1995).

For example, in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 648-649 (1985), the Court rejected the government's argument that a ban on illustrations in attorney advertisements could be justified by unsubstantiated claims that the public would be misled, manipulated, or confused. Finding that "the State's arguments amount to little more than unsupported assertions," the Court concluded that the State's interest was insufficient, because the State had failed to offer "any evidence or authority of any kind" to support its contentions. *Id.* Thus, "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

Against this background, the government asserts two purportedly substantial interests in this case—discouraging public participation in commercial gaming, and assisting the policies of States that restrict gaming by regulating the interstate broadcast of casino gaming advertisements. *See* Pet. App. 4a. Although the government attempts to characterize the two interests as separate, they are in fact closely related. In choosing to aid the policies of non-gaming States, the government obviously frustrates the interests of pro-gaming States which would prefer to allow, if not encourage, the broadcast of casino gaming

advertisements. Thus, the decision to protect the interests of non-gaming States, rather than gaming States, can only be justified if the interests of non-gaming States are more significant. Ultimately, then, the government must offer credible evidence to demonstrate that reducing involvement in casino gaming constitutes a substantial governmental interest.

The Fifth Circuit found the government's interest in discouraging casino gaming to be substantial by relying primarily upon this Court's decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986). *See* Pet. App. 4a, 31a-32a. *Posadas* involved a challenge to the constitutionality of a Puerto Rico statute and regulations prohibiting the advertisement of casino gaming. In supporting the advertising restrictions, the Puerto Rican government asserted that the interest at stake was "the reduction of demand for casino gambling by the residents of Puerto Rico." 478 U.S. at 341. In particular, the government argued that excessive gambling " 'would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens.' " *Id.* (quoting Br. for Appellees at 37). This Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest," *id.*, and it therefore upheld the restrictions under the second prong of the *Central Hudson* test.

*Posadas,* however, is not dispositive in this case, for at least two reasons. First, the Court did not hold in *Posadas* that reducing participation in casino gaming is a substantial interest, but only that the protection of "health, safety, and welfare"—standing alone—is a substantial interest. *Id.* The Court assumed, without examining any evidence from the parties, that casino gaming would impair the health, safety, and welfare of the citizenry. As several members of this Court and the government have acknowledged, *Posadas* did not require any evidentiary showing concerning the hazards of casino gaming; it merely presumed that the connection could be



made and it accepted the government's rationale without further inquiry. *See 44 Liquormart,* 517 U.S. at 531 (O'Connor, J., concurring); Opp. at 18. As we explain more fully below, however, that assumption is unsupported.

Second, the approach taken by *Posadas* has since been substantially undermined. In case after case since *Posadas,* "this Court has examined more searchingly the State's professed goal * * * before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny." *44 Liquormart,* 517 U.S. at 531 (O'Connor, J., concurring) (citing five post-*Posadas* decisions). "In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal." *Id.*

Accordingly, the conclusion reached in *Posadas* will not shield § 1304 from constitutional attack unless the government can satisfy its burden to present credible evidence of the deleterious effects of casino gaming. In light of recent studies on the effects of casino gaming, and considering the significant flaws in the government's lodging, the Court should find that the government has failed to satisfy this fundamental obligation.

### A. Casino Gaming Does Not Produce Substantially Harmful Effects.

The government's assertion that casino gaming creates significant harms is not supported by the more recent, reliable studies detailing the impacts of gaming. The government's lodging identifies three primary harms of casino gaming: (1) crime, including street crime and organized crime; (2) compulsive gambling; and (3) suicide. The evidence demonstrates, however, that these concerns are greatly exaggerated and are counterbalanced by the substantial benefits that casino gaming produces for America's communities.

**1. *Casino gaming does not substantially increase crime.***

An analysis of the data and the literature regarding the connection between casinos and street crime reveals that there is "little evidence to support the notion that the presence of casino gaming in a community has any meaningful impact on crime rates." Jeremy Margolis, *Casinos and Crime: An Analysis of the Evidence* 3 (Dec. 1997) (AGAL 1).[3] The most significant evidence on this issue was released just this month by the National Opinion Research Council ("NORC") at the University of Chicago, a non-partisan organization authorized to study the positive and negative effects of all forms of gaming in America by the National Gambling Impact Study Commission ("NGISC"), itself a bipartisan commission created by Congress. *See* National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996). The $1.24 million NORC study—the first national survey of gaming behavior conducted since the previous national commission studied the issue in 1976—compiled publicly-available information on the impacts of gaming in 100 communities across the country. *See Overview of National Survey and Community Database Research on Gambling Behavior,* Report to the Nat'l Gambling Impact Study Comm'n, Nat'l Opinion Research Council at Univ. of Chicago, at 2-5 (Feb. 1, 1999) ("*NORC Study*") (AGAL 2).

With respect to the connection between gaming and street crime, the authors' findings were clear—"the casino effect is not statistically significant for any * * * crime outcome measures." *Id.* at 52. The NORC's research revealed that any casino-related crime is either "small enough as not to be noticeable in the general wash of the statistics," or easily "countered by other effects." *Id.* Indeed, the study concluded that "[t]he net picture in

[3] The various studies and articles cited in this brief have been lodged with the Clerk for the convenience of the Court. The "AGAL" cite refers to the number of the document within the American Gaming Association Lodging.



the economic and crime data is on the *positive* side," albeit "not in an overwhelming way." *Id.* at 53 (emphasis added).

Additional studies confirm the NORC's findings. For example, after reviewing more than twenty-seven empirical studies on gaming and crime, and after analyzing the FBI's Uniform Crime Reports ("UCR"), one researcher concluded that "communities with casinos are just as safe as communities that do not have casinos." Margolis, *supra,* at 1 (AGAL 1). Rather than expanding after the introduction of gaming activities, "[c]rime patterns tend to ebb and flow in general trends explicable only by the interplay of powerful social forces." *Id.* at 26. In fact, once visitor increases in total population in gaming communities are accounted for, "there is no increase in crime rates when comparing pre- and post-casino periods." *Id.* at 1.

The FBI's UCR numbers reinforce these conclusions. According to the 1996 UCR, Las Vegas had a lower crime rate than many other non-casino gaming American tourist destinations, including Miami, New Orleans, Honolulu, and Phoenix. U.S. Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States: Uniform Crime Reports* 84-110 (1996) (AGAL 3). Likewise, crime decreased in Baton Rouge, Louisiana after two casinos opened there in late 1994, and in Shreveport, Louisiana following the introduction of casino gaming in that city in April 1994. *Id.*; Margolis, *supra,* at 33 (AGAL 1). And these low crime rates are rarely attributable to a substantial rise in police resources; Las Vegas, for instance, had one of the lowest officer to population ratios among major American cities in 1996. *Uniform Crime Reports,* at 293-364 (AGAL 3).

The statements of law enforcement officials in gaming jurisdictions further support these views. Although the officials' statements lack the force of scientific research, it is still worth noting that many local officials have found

no empirical link between gaming and crime. In testimony before the NGISC, for example, New Jersey Attorney General Peter Verniero declared that crime in his State "is actually lower today than before the advent of casinos." Peter Verniero, *Testimony Before the NGISC* (Jan. 21, 1998, at 50).[4] Likewise, Donald Sandridge, mayor of Alton, Illinois, testified that "critics of riverboat gaming projected increases of crime, prostitution, and organized crime activities * * * but none of those have occurred." Donald Sandridge, *Testimony Before the NGISC* (May 20, 1998, at 20). Quoting the State Attorney, Sandridge noted that "there's been absolutely no crime problem occurring in Madison County which has resulted from the operation of the Alton Belle casino on the Alton Illinois riverfront." *Id.* The executive director of the Mississippi Coast Crime Commission reported as well that "[o]ur crime office has no direct evidence to indicate that casinos have caused an increase of crime along our three-county coast from 1994 to 1997." Bob Waterbury, *Testimony Before the NGISC* (Sept. 10, 1998, at 249). And St. Charles, Missouri Police Chief David King wrote that, in his community, "none of the gambling opponents' predictions of violent crime, corruption of public officials, prostitution, or the like have occurred." David King, *Everything's Coming Up Aces in St. Charles,* 12 Missouri Police Chief 4 (Spring 1995) (AGAL 4).

In addition, there is no support for the myth that modern gaming is directly linked to organized crime. While gaming's history is peppered with tales of organized crime, the "presence and/or influence of organized crime is no longer a factor in the modern, regulated gaming-entertainment industry." Margolis, *supra,* at 2 (AGAL 1). For one thing, there is "no industry in America more regulated than the casino industry." Hon. Robert

[4] All testimony before the NGISC is available on the National Gambling Impact Study Commission Internet Site at <http://www.ngisc.gov/meetings/meetings.html>.



Torricelli, *Testimony Before the NGISC* (Jan. 21, 1998, at 21-22). Casino license applicants typically provide state regulators with exhaustive information on each employee, including fingerprints and identifying marks, family members, residential, employment, criminal and educational histories, character references, tax information, litigation and licensure histories, and financial information. Margolis, *supra,* at 47-48 (AGAL 1). Moreover, many of the largest gaming companies, such as Harrah's Entertainment, Inc., Mirage Resorts, Inc., MGM Grand, Inc., and Park Place Entertainment Corp., are now publicly-owned, and are thus subject to the watchful eye of the Securities and Exchange Commission, other federal regulators, and their own public shareholders.

As a result, state officials are virtually unanimous in reporting that organized crime is not a factor in today's gaming-entertainment industry. A Massachusetts report concluded that "[i]ncreased state regulatory oversight has effectively cleared the casino industry of organized crime." Senate Report, The Commonwealth of Massachusetts: Senate Comm. on Post Audit and Oversight, *Toward Gaming Regulation, Part I: Crime* 1415 (1997) (AGAL 5). Similarly, regulators in Indiana, Missouri, Nevada, Iowa, and Illinois have all reported that organized crime exerts no influence on the gaming industry. Margolis, *supra,* at 49-50 (AGAL 1) (citing correspondence from leading regulators in these States). The continued misperception that organized crime is linked to the modern gaming-entertainment industry is thus not supported by the evidence.

***2. The causes of compulsive gambling are speculative and the prevalance of compulsive gambling is exaggerated.***

The casino industry has consistently emphasized that "one problem gambler is one too many," and the AGA does not dispute the serious harms that can result when disordered gamblers fail to seek, or respond to, professional assistance. Nevertheless, the government's attempt

to characterize disordered gambling as a substantial problem directly linked to legalized gaming is misplaced.

First, studies demonstrate that only a very low percentage of American adults can be classified as compulsive gamblers. The NORC study revealed that only two-thirds of one percent of the adult population in America could be classified in the last year as pathological gamblers. *NORC Study*, at 22-23 (AGAL 2). Similarly, a recent Harvard Medical School study—performed by the School's Division on Addictions—synthesized information from over 120 other gaming surveys conducted over the last twenty years and concluded that "[t]he majority of Americans and Canadians gamble with little or no adverse consequences." Howard J. Shaffer *et al.*, *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Meta-analysis* ii (Dec. 15, 1997) (AGAL 6).

Second, the evidence does not support the assumption that compulsive gambling is directly linked to the rise in legalized gaming. Dr. Howard J. Shaffer, Director of the Harvard Medical School Division on Addictions, told the NGISC that the idea that disordered gaming is growing in direct proportion to gaming opportunities "may not be an accurate perception." Howard J. Shaffer, *Testimony Before the NGISC* ("Shaffer Testimony") (Jan. 22, 1998, at 61). As the NORC study concluded, the availability of a lottery and the availability of a casino within driving distance do "not appear to affect prevalence rates" for disordered gamblers. *NORC Study*, at 26 (AGAL 2); *see* Shaffer *et al.*, *supra*, at iv (AGAL 6) (finding "no significant regional variation in the rates of gambling disorders" despite the presence of more casinos in certain regions of the country). No research has revealed a relationship between shifting social trends and the prevalence of disordered gambling, and statistics show that gaming itself has "expanded much more rapidly than the rate of disordered gambling." Shaffer Testimony, at 61. Thus, the "availability [of legalized gaming] is not a sufficient, sole explanation for the increased rate of gambling



as an addictive disorder in the United States." Shaffer Testimony, at 61; *see* Lisa Megargle George *et al.*, *What We Need to Know About Casino Development*, 2 Wharton Real Estate Review 48, 60 (Spring 1998) (AGAL 7) ("[C]urrent research concerning problem gambling is inadequate to conclude whether casinos create problem gamblers.").

### 3. *Casino gaming does not increase the risk of suicide.*

The claim that the expansion of legalized casino gaming elevates suicide rates is similarly groundless. "When standard statistics are used, and when the masking effects of extraneous factors are controlled, suicide levels in Atlantic City, Las Vegas, Reno and other U.S. casino resort areas are about average compared to nongaming areas." Richard McCleary & Kenneth Chew, *Suicide and Gambling: An Analysis of Suicide Rates in U.S. Counties and Metropolitan Areas* 9 (Sept. 1998) (AGAL 8) (emphasis omitted). The data reveals that suicide rates do not increase in communities after gaming is legalized, and demonstrates that there is "no evidence to support the proposition that residents or visitors of gaming areas * * * face heightened risks of suicide" because of the presence of gaming. *Id.* at 1; *see* Christian Marfels, *Visitor Suicides and Problem Gambling in the Las Vegas Market: A Phenomenon in Search of Evidence*, 2 Gaming Law Review 465, 472 (Oct. 1998) (AGAL 9) (examining the Las Vegas coroner's suicide files over an eight-year period, and concluding that "the frequent allegations of a connection between Las Vegas visitor suicides and gambling are not substantiated by fact").[5]

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[5] The Centers for Disease Control and Prevention have also determined that rates of suicide are consistently higher in the western States (including Utah, one of only three States with no form of legalized gaming), a finding which is inconsistent with the presence of gaming facilities throughout the country. *Regional Variations in Suicide Rates—United States, 1990-1994*, 46 Morbidity and Mortality Weekly Report 789, 790-791 (Aug. 29, 1997) (AGAL 10); *see Rate, Number, and Ranking of Suicide for Each U.S.A. State,*

**4. *Any harms from gaming are offset by the industry's positive economic and social effects.***

Any evaluation of the social costs of gaming must also account for the proven economic and social benefits which gaming provides to America's communities. The government's lodging details the alleged harms of gaming, but completely ignores the positive consequences that gaming can create through jobs, increased tax revenue, capital expenditures, and tourism. This presents an incomplete picture of gaming's effects and undermines the government's contention that it has a substantial interest in discouraging casino gaming.

"The benefits of a new casino include shareholder profits, reduced local unemployment, economic growth in supplier markets, tax revenue for state and local governments, and increases in community property values." George *et al., supra*, at 49 (AGAL 7). A recent study sponsored by the NGISC concluded that "a new casino, of even limited attractiveness and placed in a market that is not already saturated, will yield positive economic benefits on net to its host economy." Adam Rose & Assocs., *The Regional Economic Impacts of Casino Gambling: Assessment of the Literature and Establishment of a Research Agenda* 22 (Nov. 5, 1998) (AGAL 12) (emphasis omitted). As the author documented, fifteen of the twenty-seven major studies on gaming have determined that casinos have a significantly or highly positive economic impact, while only two have found negative impacts. Dr. Adam Rose, *Testimony Before the NGISC* (Sept. 11, 1998, at 167); *see NORC Study*, at 52 (AGAL 2) (studying 100 communities and finding that casinos result "in a marked decrease in the percentage of the labor force that is unemployed").

A 1996 study performed by Arthur Andersen is instructive. After reviewing key economic figures, the survey

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*1996*, American Association of Suicidology (Nov. 19, 1998) (AGAL 11).



reported that the "casino gaming industry is clearly an important provider of jobs, wages and taxes to the U.S. economy." Arthur Andersen, *Economic Impacts of Casino Gaming in the United States, Vol. 1: Macro Study* 15 (Dec. 1996) (AGAL 13). In 1995, the gaming industry paid a total of $2.9 billion in direct taxes, employed almost 300,000 people and paid $7.3 billion in wages—providing its employees with an average national wage that exceeded that of other entertainment industries—and invested $3 for every $1 earned. *Id.* at 1-15. Additionally, at the local level, "[t]housands of new jobs were created which provide good wages and full benefits," casino revenues enabled cities and States "to lower taxes and pay for many basic civil needs," and the introduction of casinos led "to growth in almost all other areas: retail sales, commercial and housing construction, restaurants, etc." Arthur Andersen, *Economic Impacts of Casino Gambling in the United States, Vol. 2: Micro Study* 9 (May 1997) (AGAL 14); *see* Eugene Martin Christiansen, *Gambling and the American Economy*, Annals of American Academy of Political and Social Science 36, 43-49 (Mar. 1998) (AGAL 15) (finding that the gaming industry pays billions of dollars in taxes, provides over 400,000 jobs, and provides substantial investment capital).

The gaming industry also provides significant social benefits to its employees and to local communities. A 1997 study of 178,000 gaming employees found, for instance, that more than 8.5% of the employees in the survey left welfare as a result of their casino jobs; almost 16% used their jobs to replace unemployment benefits; 63% obtained improved access to health care benefits; 43% received better access to day care for their children; and 65% developed new skills as a result of their gaming industry employment. Coopers & Lybrand L.L.P., *Gaming Industry Employee Impact Study* 2-3 (Oct. 1997) (AGAL 16).[6]

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[6] The Coopers & Lybrand L.L.P. study was the first comprehensive nationwide study of gaming industry employees, and the re-

It is thus not surprising that forty-seven of the fifty States now allow some form of gaming, and that ten States allow non-Indian casino gaming, in addition to Michigan, which has authorized, but not yet implemented, casino games. *United States Gaming at a Glance,* Int'l Gaming & Wagering Bus. 21 (Sept. 1998) (AGAL 17). As recently as 1990, only two States—Nevada and New Jersey—had permitted non-Indian casinos to operate. I. Nelson Rose, *Gambling and the Law: Recent Legal Developments, 1998* 17 (Feb. 6, 1998) (AGAL 18). This "sea change in public attitudes" further "undermines any claim that a State's interest in discouraging its citizens from participating in" commercial gaming "is so substantial as to outweigh [petitioner's] First Amendment right to distribute, and the public's right to receive, truthful, nonmisleading information about a perfectly legal activity." *United States* v. *Edge Broad. Co.,* 509 U.S. 418, 440-441 (1993) (Stevens, J., dissenting) (arguing that the trend in the legalization of state-run lotteries "surely undermines" the government's assertion of a substantial interest in banning lottery advertisements in non-lottery States).

Therefore, the government's attempt to demonstrate the social costs of casino gaming seriously undervalues the impact of casino gaming in the United States. A more complete evaluation of the industry establishes that casino gaming produces substantial economic and social benefits in a growing number of America's communities.

### B. The Government's Evidence on the Harmful Effects of Gaming Is Fundamentally Flawed.

The government has also not met its burden to demonstrate that reducing commercial casino gaming constitutes a substantial interest, because the evidence upon which it relies in this Court amounts to little more than "junk social science." The government's evidence is often supported by "fragments of social science research and reams

searchers surveyed almost 54% of the total industry employee base. Coopers & Lybrand L.L.P., *supra,* at 2 (AGAL 16).



of anecdotal evidence." George *et al., supra,* at 49 (AGAL 7). Thus, the studies are insufficient to demonstrate that gaming imperils the welfare of America's citizens, and "[s]uch speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *44 Liquormart,* 517 U.S. at 507 (Stevens, J.).[7]

1. As an initial matter, the mere existence of the NGISC undermines the government's attempt to show that sufficient information exists to justify the suppression of truthful speech. Congress created the NGISC in August 1996 in part because "questions have been raised regarding the social and economic impacts of gambling, and Federal, State, local, and Native American tribal governments lack recent, comprehensive information regarding those impacts." National Gambling Impact Study Commission Act § 2. By creating the NGISC, and by expressly finding that there was a lack of current information on the impact of gambling, Congress itself has acknowledged that research conducted prior to August 1996 is insufficient to show that gaming produces negative consequences. As a result, the studies in the government's lodging—*all* of which pre-date the creation of the NGISC —do not satisfy the government's burden to justify restrictions on commercial speech.[8]

[7] At least one circuit has applied the framework for assessing expert testimony from *Daubert* v. *Merrell Dow Pharms., Inc.,* 509 U.S. 579, 589-592 (1993), to social science experts as well. *See Tyus* v. *Urban Search Management,* 102 F.3d 256, 263 (7th Cir. 1996) ("Social science testimony, like other expert testimony proffered under Fed. R. Evid. 104(a) for admission under Rule 702, must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work.") (quotation omitted), *cert. denied,* 117 S. Ct. 2409 (1997). The issue of whether *Daubert* should apply to other kinds of expert evidence is also currently before this Court. *See Kumho Tire Co.* v. *Carmichael, cert. granted,* 118 S. Ct. 2339 (1998) (No. 97-1709).

[8] In contrast to the government's lodging, every study cited in section I.A., *supra,* post-dates the creation of the NGISC.

2. At a more specific level, the studies in the government's lodging are riddled with flaws and inconsistencies. The government begins by relying on testimony from a June 1985 hearing by the President's Commission on Organized Crime to demonstrate a link between organized crime and legalized gaming, Government's Lodging ("GL") at 49, but there are at least three problems with this evidence. First, the testimony is outdated and relies entirely on historical anecdotes of organized crime. *See, e.g.*, GL at 54 (describing the presence of organized crime in casinos in the early 1970s). Second, even when the testimony does seem to establish a connection between organized crime and gaming—*e.g.*, between organized crime and the "junket industry"—the witnesses admit that any connection is "of course" based on events which "predated the advent of casino gaming" and is thus unreliable. GL at 61. Third, the witnesses themselves state that law enforcement has been "very successful" in keeping organized crime out of areas like Atlantic City, thereby nullifying any alleged link between organized crime and the gaming-entertainment industry. *Id.* Accordingly, the better view, as demonstrated by more recent studies, is that any relationship today between organized crime and gaming has not been established. *See, e.g.*, Margolis, *supra*, at 43 (AGAL 1).

3. The government next relies on a report by Maryland Attorney General J. Joseph Curran, Jr., who argues that "casinos are a bad idea" because of their impact on state and local crime. GL at 111. The best that can be said about the Attorney General's "study" is that it exemplifies the hazards that can result when non-experts attempt to analyze complex social issues in a political environment. Reviewing the Attorney General's report, Dr. David Giacopossi, a Professor in the Department of Criminology and Criminal Justice at the University of Memphis, concluded that "it is based on evidence that is selective, and, therefore, incomplete." David Giacopossi, *An Analysis of the Maryland Report "The House Never*



*Loses and Maryland Cannot Win * * *"* 4 (1995) (AGAL 19). As Dr. Giacopossi explained:

> There are four basic problems with the Attorney General's report. First, the Report exaggerates and distorts the impact of crime related to casino gambling and fails to utilize the accepted methods of analysis recommended by, among others, the FBI. Second, the Report does not accurately reflect the conclusions of academic writings. Third, the Report presents a distorted picture not only of the risk of victimization but also of the criminogenic factors and types of crime associated with casino gambling. Fourth, the Report does not employ a methodology that assures representativeness of the interviews and anecdotal evidence presented. [*Id.*]

Therefore, this evidence fails to support the government's assertion that casino gaming produces harmful effects.

4. The government next presents studies discussing compulsive and pathological gambling, but none of this research is persuasive either. First, many of the studies shed no light at all on the government's theory that casino gaming produces social costs. For example, the American Psychiatric Association paper, GL at 180, merely describes the features of disordered gambling, without examining any of its causes or possible harms.

Second, the studies that do purport to show that a substantial percentage of Americans are compulsive gamblers have been flatly contradicted by more recent, comprehensive surveys. As noted earlier, the non-partisan NORC report released in February 1999 shows that only 0.6% of adult Americans could be classified in the last year as pathological gamblers. *NORC Study*, at 22-23 (AGAL 2). The more recent studies also reveal no support for the assertion that compulsive gambling is directly linked to the rise in legalized gaming. *See, e.g., id.* at 26; Shaffer Testimony, at 61.

Third, most of the studies' authors admit that their own research is incomplete. For example, the article by

John B. Murray, GL at 338, which surveys virtually every other study identified by the government on the subject of pathological gambling, ultimately concludes that "[m]any gaps exist in the research," GL at 351, and that "[m]uch more information is needed to build on what research * * * these questions ha[ve] yielded." GL at 338. Likewise, the article by Mark Dickerson, GL at 268, concludes that drawing judgments about the characteristics of disordered gambling is difficult because "adequate research has been so very slow in developing." GL at 279. And the piece written by Henry R. Lesieur and Robert L. Custer even contradicts the government's own thesis, stating that "we should *not* equate sheer availability of gambling with pathological gambling or its side effects." GL at 295 (emphasis added).

Fourth, several of the authors upon which the government relies have been severely criticized for their research methods and conclusions. One example involves Robert M. Politzer, GL at 305, who began analyzing the social impacts of gaming as early as 1981. Academics have recognized the "fundamental limitations" in Politzer's work and have termed his research "unsuitable for policy application to casino cost-benefit analysis." George *et al., supra,* at 58-59 (AGAL 7).

5. The government also relies heavily—and tellingly—on a declaration by Robert Goodman. GL at 379. Goodman is an urban planner, not an economist, and he has no academic training in criminology or psychology. His book on the social and economic consequences of gaming, entitled *The Luck Business: The Devastating Consequences and Broken Promises of America's Gambling Explosion* (1995), relied solely on interviews—including, incredibly, only one discussion with officials from Nevada and Atlantic City—and has been described by academics as an "unabashed polemic" based entirely on "sweeping generalizations." Robert R. Detlefsen, *Killjoy is here: new anti-gambling hysteria,* Virginia Pilot, Nov. 13, 1995, at A6 (AGAL 20). *The Luck Business* "is a Halloween book, one that aims to frighten the reader but is marred



by one-sided and incomplete arguments that will convince only the credulous." David L. Rados, 16 *Journal of Macromarketing* 140, 142 (Spring 1996) (AGAL 21); *see Wagers of Sin,* Reason Magazine, at 26 (Dec. 1997) (AGAL 22) (Goodman's work "is not based on accepted economic theory. * * * He doesn't seem to understand the most basic principles of consumer economics") (quoting Gabrielle Brenner, economist, Ecole des Hautes Etudes Commerciales, Montreal).[9]

6. Finally, the one study discussing compulsive gambling among adolescents is thoroughly unconvincing. The government cites to a study of students at an Atlantic City high school which purports to show that the dangers of compulsive gambling are heightened by societal acceptance of legalized gaming. GL at 438. This study draws its conclusion, however, from such defective sources as a high school newspaper poll and an interview with a high school counselor. By contrast, more recent and reliable studies show that adolescent gaming is not on the rise. The NORC study, for example, found that the percentage of young adults who have placed a bet in the last year was 10% *less* in 1998 than in 1974. *NORC Study,* at 10 (AGAL 2). Likewise, the Harvard Medical School study, which analyzed more than 120 other studies by academics and social scientists, found no "increase in the rate of gambling disorders among adolescents * * * dur-

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[9] In March 1994, Goodman wrote that 40% of all white-collar crime "had its roots in gambling." Robert Goodman, *Legalized Gambling as a Strategy for Economic Development* 59 (March 1994). Scores of newspapers, respected magazines, and public officials have since used this figure to oppose the growth of casino gaming. *See* Joseph M. Kelly, *The American Insurance Institute, Like THAT Bunny, Keeps Going and Going and Going* * * *, 1 Gaming Law Review 209, 209 (1997) (AGAL 23). But the statistic has no basis. *Id.* at 210-212. Even gaming opponents have recognized that "[i]t is supposedly the product of the American Insurance Institute. In fact, no such organization exists, and no one has ever been able to locate a copy of a report documenting the claim." Joseph Tydings & Peter Reuter, *Casino Gambling: Bring In The Feds,* Wash. Post, Feb. 6, 1996, at A15.

ing the past two decades." Shaffer *et al., supra,* at iv (AGAL 6). The government's evidence on this issue is outdated and unpersuasive.

In light of all the foregoing, the government has not met its burden under *Central Hudson* to demonstrate that it has a substantial interest in reducing participation in commercial casino gaming through a ban on the broadcast of gaming advertisements. As the more recent and credible studies demonstrate, casino gaming produces significant economic and social benefits without endangering the health, safety, or welfare of America's residents.

## II. THE BAN ON THE BROADCAST OF CASINO GAMING ADVERTISEMENTS DOES NOT DIRECTLY ADVANCE THE GOVERNMENT'S ASSERTED INTERESTS.

Even if the government had credible evidence to demonstrate that its interests are substantial, the advertising ban would still be fatally flawed because it fails to satisfy the remaining factors in the *Central Hudson* test. The third prong of *Central Hudson* requires the government to show that its restriction "directly advances the governmental interest asserted." 447 U.S. at 566. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose," *id.* at 564, and "[f]or that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart,* 517 U.S. at 505 (Stevens, J.) (quoting *Edenfield,* 507 U.S. at 771).

A ban on the broadcast of gaming advertisements cannot materially advance the government's purported interests in light of the myriad exceptions to § 1304. The Federal Communications Commission regulation implementing § 1304 provides that the advertising ban does not apply to state lotteries, fishing contests, Native American gaming, non-profit or governmental lotteries, and lotteries run as a promotional activity for commercial organizations. 47 C.F.R. § 73.1211(c). These exceptions render



it "impossible" for § 1304 "materially to discourage public participation in commercial" gaming. *Valley Broad. Co.* v. *United States,* 107 F.3d 1328, 1335 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 1050 (1998). By permitting such advertisements, the government defeats the very goal which it classifies as substantial. Indeed, it allows advertisements for gaming and games of chance while simultaneously attacking such advertisements as ruinous of the country's social and moral fiber. *See Players Int'l, Inc.,* 988 F. Supp. at 506 ("[T]he underlying governmental policy * * * is subverted by the exceptions to § 1304. The exceptions allow the same activities the government believes cause significant public harm.").[10]

This Court's opinion in *Rubin* v. *Coors Brewing Co.,* 514 U.S. 476 (1995), is instructive. In that case, the Court concluded that a federal statute prohibiting disclosure of the alcohol content of beer on labels or in advertising violated the First Amendment. The Court was particularly troubled by the "overall irrationality of the Government's regulatory scheme," *id.* at 488, finding that the law's exemptions and inconsistencies "ensure[] that the labeling ban will fail to achieve" its stated goal. *Id.* at 489. As the Court wrote, "[t]here is little chance that [the labeling Act] can directly and materially advance its aim, while other provisions of the Act directly undermine and counteract its effects." *Id.* Likewise, in this case, there is "little chance" that § 1304 can directly and materially reduce participation in commercial casino gaming, while the numerous exceptions to the statute permit the broadcast of gaming advertisements and thus "undermine and counteract" the statute's effects. *Id.*

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[10] A commercial speech restriction can directly advance a governmental interest even if it is underinclusive, *see, e.g., Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490, 511 (1981), but where "a prohibition makes only a minute contribution to the advancement of a state interest [it] can hardly be considered to have advanced the interest 'to a material degree.'" *Bad Frog Brewery, Inc.* v. *New York State Liquor Auth.,* 134 F.3d 87, 99 (2d Cir. 1998) (quoting *Edenfield,* 507 U.S. at 771).

In its initial opinion, the court below distinguished *Rubin* on the ground that it was based solely on "conflicts" between certain federal laws rather than exceptions to the federal statute. Pet. App. 33a. But that reading of *Rubin* is plainly incorrect. In discussing the "irrationality of the Government's regulatory scheme," the *Rubin* Court expressly emphasized the exceptions to the federal labeling law. 514 U.S. at 488. For example, the Court noted that while the labeling provision banned "the disclosure of alcohol content on beer labels, it allow[ed] the exact opposite in the case of wine and spirits." *Id.* Similarly, the Court remarked that the statute still permitted brewers to signal high alcohol content through use of the term "malt liquor." *Id.* at 488-489. Thus, *Rubin* did find that exceptions to the federal law rendered the government's commercial speech restriction unconstitutional, and that determination applies squarely in this case.[11]

The Fifth Circuit also erroneously relied on *Edge Broadcasting Co.*, 509 U.S. at 418, for the proposition that the government can allow other types of media to advertise gaming while still advancing its asserted interests. Pet. App. 10a. This Court held in *Edge* that the First Amendment permits Congress to ban the broadcast of lottery advertisements in non-lottery States, while allowing such broadcasts in lottery States, in an effort to support the

[11] In *Posadas*, this Court upheld a restriction on casino gambling advertisements despite the fact that the challenged regulation also permitted advertisements for horse races, cockfights, and the lottery. *See* 478 U.S. at 342-343. Nevertheless, as the Ninth Circuit has recognized, *see Valley Broad. Co.*, 107 F.3d at 1336, *Posadas* is easily distinguishable. In *Posadas*, the government defined its interest as "the reduction of demand for *casino* gambling." 478 U.S. at 341 (emphasis added). Thus, it was sufficient that the restriction reached casino gambling advertisements alone. *See id.* at 342-343. Here, by contrast, the government attempts to reduce participation in *all* types of commercial gaming. Therefore, any exceptions to the law which permit commercial gaming advertisements—including lottery, fishing contest, and Indian gaming advertisements—directly inhibit the advancement of the government's objectives.



policies of non-lottery jurisdictions. *Edge* was premised, however, on the existence of a direct link between the federal policy and the government's asserted interests; that is, the government sought to aid non-lottery States by banning advertisements in non-lottery States. *Id.* at 433-434. Here, by contrast, the government seeks to aid non-gaming States by banning advertisements in gaming States as well. Thus, while the government "accommodate[d] the countervailing interests of" gaming States in *Edge*, *id.* at 434, it stifles the interests of gaming States in this case.

The Fifth Circuit's unqualified assertion that the "government may legitimately distinguish among certain kinds of gambling for advertising purposes" is also misplaced. Pet. App. 9a. The government's ability to distinguish among different types of gaming through restrictions on commercial speech is still constrained by the First Amendment. As a result, the government may only differentiate among speakers if its restriction "directly advances the governmental interest asserted." *Central Hudson*, 447 U.S. at 566. Here, the restriction does not advance the government's interest, and it thus cannot withstand constitutional scrutiny.

Finally, the Fifth Circuit's statement that fulfillment of the "direct advancement" prong of *Central Hudson* "must be evident from the casinos' vigorous pursuit of litigation to overturn it" is an affront to principles of free speech. Pet. App. 10a. If accepted, this reasoning would surely chill constitutional challenges to government restrictions, because the challenge itself would be viewed as conclusive evidence of the restriction's effectiveness.[12]

Accordingly, this Court should find that the ban on broadcast advertisements for commercial gaming does not

[12] The Fifth Circuit's reasoning is also factually incorrect. The plaintiffs in this case are *broadcasters*, not casinos, and their "vigorous pursuit of [the] litigation," Pet. App. 10a, says nothing about whether the restriction directly advances the government's interests.

directly advance the government's asserted interests. The exceptions to § 1304 are too numerous—and the similarity to *Rubin* too great—to shield the statute from constitutional attack.[13]

## III. THE BAN ON THE BROADCAST OF CASINO GAMING ADVERTISEMENTS IS MORE EXTENSIVE THAN NECESSARY TO SERVE ANY PURPORTED GOVERNMENT INTEREST.

The restriction on gaming advertisements in § 1304 also fails the fourth prong of *Central Hudson* because it is more extensive than necessary to serve the government's asserted goals. This Court's "commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *Edge Broad. Co.*, 509 U.S. at 429. Any "speech restrictions must be 'narrowly drawn,'" and "[t]he regulatory technique may extend only as far as the interest it serves." *Central Hudson*, 447 U.S. at 565 (quoting *In re Primus*, 436 U.S. 412, 438 (1978)). Further, the government cannot "completely suppress information when narrower restrictions on expression would serve its interest as well." *Central Hudson*, 447 U.S. at 565. In light of these principles, the restriction at issue here is unconstitutional because (1) a broadcast ban is far more restrictive than necessary to achieve the government's objectives and (2) less speech-restrictive alternatives are readily available.

### A. A Broadcast Ban Is Disproportionate to Any Alleged Harms Caused by Casino Gaming.

This Court has made clear that the method by which the government seeks to achieve its asserted goal must be

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[13] It is worth nothing that even the FCC has expressed doubts about the constitutionality of § 1304. In a 1995 letter to the Chairman of the House Subcommittee on Telecommunications and Finance, all five FCC Commissioners suggested that Congress should eliminate § 1304, in part because they believed it to be "archaic and of questionable validity under the First Amendment." *See* Attachment to Letter from the FCC to the Hon. Jack Fields (May 26, 1995), at 28-29 (AGAL 24).



"'in proportion to the interest served.'" *Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 435 U.S. 191, 203 (1982)). "'[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct,'" *Edge*, 509 U.S. at 430 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)), and "[t]he scope of the restriction on speech must be reasonably * * * targeted to address the harm intended to be regulated." *44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring).

The restriction on broadcast gaming advertisements flunks these standards. As illustrated above, a number of recent studies have shown that gaming is not a pervasive problem in America's social and economic landscape. For example, "the casino effect is not statistically significant for any * * * crime outcome measures," *NORC Study*, at 52 (AGAL 2), and "[t]he majority of Americans and Canadians gamble with little or no adverse consequences." Shaffer *et al.*, *supra*, at ii (AGAL 6). As a result, a ban on the broadcast of certain casino gaming advertisements is more extensive than necessary to achieve any possible government interests. The attempt to reduce gaming through § 1304 is akin to banning all commercials to thwart a few instances of consumer fraud; the sanction is far more severe than the "'overall problem the government seeks to correct.'" *Edge*, 509 U.S. at 430 (quoting *Ward*, 491 U.S. at 801).

In rejecting this argument, the Fifth Circuit drew a "direct inference from *Edge*" that the government may always use a ban on broadcast advertising to control demand for an activity. Pet. App. 15a. *Edge*, however, held only that a ban in non-lottery States could be used to support the interests of non-lottery States; it never held that a prohibition in both gaming *and* non-gaming States could withstand scrutiny. In fact, the Court viewed the statute in *Edge* as no broader than necessary precisely because it did not reach, and did "not interfer[e]" with,

the interests of gaming jurisdictions. 509 U.S. at 428. Here, of course, the statute *does* interfere with the interests of gaming jurisdictions, and thus fails the Court's standards for constitutional review.

Therefore, even if the government's interests were substantial, and even if the restrictions directly advanced those interests, § 1304 would still be unconstitutional, inasmuch as its restriction on truthful speech is not " 'in proportion to the interest served.' " *Fox*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. at 203).

**B. Less Speech-Restrictive Alternatives Are Available.**

The prohibition on the broadcast of gaming advertisements is also constitutionally suspect in view of the availability of less speech-restrictive alternatives to § 1304. While the government is not required to use the least restrictive means to pursue its objectives, *Fox*, 492 U.S. at 477, "the fit between means and ends must be narrowly tailored." *44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring) (quotation omitted). And in determining this "fit," "the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech * * * is certainly a relevant consideration.' " *Florida Bar*, 515 U.S. at 632 (quoting *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)); *see 44 Liquormart*, 517 U.S. at 529 (O'Connor, J. concurring) ("The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's end and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.").

Here there are a number of less burdensome alternatives which could be used to combat any harms which might result from commercial gaming.[14] For example, the

[14] Ultimately, it is the government's duty to show that less restrictive alternatives do not exist, not petitioners' responsibility



government could join the industry in supporting the National Center for Responsible Gaming ("NCRG"), the industry organization designed to promote outside research on the causes and effects of problem and underage gambling. *See* AGAL 25. In its first two years of existence, the NCRG has awarded more than $2 million in grants to support scientific research for the understanding and prevention of disordered gambling. The AGA has also produced several training videos and workshops, and has sponsored a number of programs designed to increase awareness of problem and underage gambling, including a week of activities designed to promote responsible gaming in casinos across the country.

Alternatively, the government could work with the States to implement regulations to address disordered gambling. Nevada, for example, recently enacted a regulation which, *inter alia*, requires gaming establishments to post problem-gambling hotline telephone numbers and brochures describing where compulsive gamblers can get help, and mandates that gaming operators offer awareness training programs for all employees who interact with customers. *See* Nevada Gaming Comm'n Reg. 5.170 (1999) (AGAL 26). The government could also address its purported concerns by adding its voice to the marketplace of ideas through its own advertisements detailing the risks of disordered and underage gambling. *See generally Posadas*, 478 U.S. at 356-357 (Brennan, J., dissenting) (listing several alternatives to a ban on gaming advertisements); *44 Liquormart*, 517 U.S. at 507 ("[E]ducational campaigns focused on the problems * * * might prove to be more effective.") (Stevens, J.).

"[T]he availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to [the party's] First Amendment rights, indicates that [the challenged statute] is more extensive

to show that they do. *See Central Hudson*, 447 U.S. at 570-571. Nevertheless, the AGA presents several alternatives here to demonstrate that the government cannot satisfy its evidentiary burden.

than necessary." *Rubin*, 514 U.S. at 491 (evaluating alternatives to a ban on disclosing alcohol content on labeling). Therefore, this Court should declare § 1304 unconstitutional in light of the government's inability to satisfy the fundamental requirements of the *Central Hudson* framework.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 98-387

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

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GREATER NEW ORLEANS BROADCASTING ASS'N, *et al.*,
*Petitioners,*

v.

UNITED STATES,
*Respondent.*

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF engages in litigation and the administrative process in a variety of areas. WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court and other courts in numerous cases dealing with commercial speech issues, including, most recently, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

## SUMMARY OF ARGUMENT

Invoking this Court's precedents, the court below accepted as legitimate the government's use of a restriction on commercial speech "to control demand for the activity" being advertised—commercial gambling. 149 F.3d at 340. In its earliest commercial speech decisions, this Court indicated that restricting commercial speech for such a manipulative purpose was impermissible. In subsequent decisions, however, the Court has appeared to accept, at least tacitly, the use of commercial speech restrictions for that purpose. But the central function of the First Amendment is to prevent the government from restricting speech to shape choice. The First Amendment therefore does not permit the government to suppress truthful

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the submission of this brief. Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

advertising for a lawful product or service for the purpose of dampening consumer demand. The Court should make unmistakably clear, as Justice Thomas urged in his concurring opinion in *44 Liquormart*, that the government may *not* restrict speech to influence choice—either in the voting booth *or* in the marketplace. As long as the speech is truthful and the choice is lawful, shielding the public from commercial information the government fears it will "mishandle" is not even a legitimate governmental interest, much less a "substantial" one, for purposes of the second prong of the *Central Hudson* test.

Relying on this Court's decisions, the court below also treated as self-evident—as something that can simply be "postulated" and requires no proof (149 F.3d at 340 n.14)—that the advertising the government seeks to suppress in this case stimulates the demand the government seeks to dampen. This, however, is a crucial question of fact, the answer to which cannot be presumed without rendering the third prong of the *Central Hudson* test purely pro forma. Does broadcast casino advertising stimulate people to gamble who would not otherwise gamble? Or does it instead merely influence people who already gamble to patronize one casino rather than another, or to place their bets at casinos rather than racetracks? If the former, restricting broadcast casino advertising may reduce gambling. If the latter, it may not. The Court should clarify that (1) the burden rests with the government to demonstrate that the advertising it seeks to suppress *in fact* stimulates the demand it seeks to dampen, (2) those seeking to overturn a commercial speech restriction are entitled to challenge the government's showing with contrary evidence, and (3) the court must carefully scrutinize the record and make an



independent judgment on this crucial factual issue based on all the evidence presented.

Finally, the court below rejected the central teaching of *44 Liquormart*—that, under the fourth prong of the *Central Hudson* test, the government may not restrict commercial speech as a means of regulating behavior if non-speech-restrictive options are available to serve that purpose; and the court incorrectly implied that the burden is on the party challenging the speech restriction to demonstrate the efficacy of non-speech-restrictive alternatives. 149 F.3d at 340. Seven Members of this Court agreed in *44 Liquormart* that, to satisfy *Central Hudson*'s fourth prong, the government must demonstrate that it could not achieve its purposes by means of non-speech-restrictive alternatives. In this case, any number of non-speech restrictive alternatives are available to the government to discourage public participation in commercial gambling. The Court should reemphasize that restricting speech is a weapon of last resort, not just one more way of getting at a perceived social problem.

## ARGUMENT

### I. THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT FROM RESTRICTING TRUTHFUL ADVERTISING FOR A LAWFUL PRODUCT OR SERVICE TO DAMPEN CONSUMER DEMAND

Under the second prong of the *Central Hudson* test, commercial speech may be restricted only in the service of a "substantial" governmental interest. The Court should make clear that the government has no legitimate

interest—much less a "substantial" one—in depriving consumers of information "so as to thwart what would otherwise be their [lawful] choices in the marketplace." *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring). Any restriction on commercial speech that the government attempts to justify as a means of manipulating lawful private choices should be held to fail the second prong of the *Central Hudson* test.

When the Court announced in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the First Amendment protects truthful speech proposing lawful commercial transactions, it stressed that the First Amendment precludes the government from suppressing such speech out of a concern that consumers, once informed, will fail to perceive their own best interests:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them * * *. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

This Court subsequently reiterated that truthful commercial speech may not be suppressed based on the government's paternalistic desire to control lawful adult behavior. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977), the Court held that the "basic" constitutional defect of an ordinance seeking to prevent



white flight by forbidding the posting of "For Sales" and "Sold" signs in residential neighborhoods was its attempt to manipulate the choices of the township's residents by preventing them from obtaining information. Similarly, in *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977), the Court held a lawyer advertising restriction unconstitutional because, among other things, it rested on "the benefits of public ignorance."

In subsequent cases, however, the Court has nevertheless appeared to accept—or, at least, has not questioned—the legitimacy of using speech restrictions to control private choice in the marketplace. In *Central Hudson*, itself, the Court invalidated a restriction on promotional advertising by utilities imposed to dampen demand for electricity—not because the Court considered the use of a speech restriction for that purpose impermissible, but because the Court found the particular restriction more extensive than necessary. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Three Justices, concurring in the judgment, apparently would have held the state's use of the speech restriction to dampen demand impermissible. *See id.* at 573 (Blackmun, J., joined by Brennan, J., concurring); *id.* at 579 (Stevens, J., joined by Brennan, J., concurring).

Similarly, in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court sustained a Puerto Rico statute banning casino advertising directed to local residents that the Commonwealth sought to justify as a means of reducing demand for casino gambling by such persons. Three Justices, writing in dissent, assailed the majority's premise that "Puerto Rico constitutionally may prevent its residents from obtaining truthful commercial speech concerning otherwise lawful activity because of the

effect it fears this information will have." *Id.* at 358 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). Justice Stevens, also writing in dissent, questioned whether the Commonwealth's concerns about the consequences of permitting "too much speech" were well founded. *Id.* at 360 n.1 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting).

Again, in *Rubin v. Coors Brewing Co,* 514 U.S. 476 (1995), the Court invalidated a federal statute prohibiting malt beverage manufacturers from disseminating information on their product labels that the government feared would stimulate consumption—not because the Court found the government's manipulative purpose problematic, but because the Court concluded that statute could not achieve its purpose.

And in *44 Liquormart*, the Court invalidated two Rhode Island laws that sought to promote temperance by restricting advertising, but only Justice Thomas found that use of a speech restriction to be impermissible. *See* 517 U.S. at 518 (concurring opinion). Justice Stevens and three other Justices also found the government's use of censorship to influence consumer behavior troubling from a First Amendment standpoint. *See id.* at 495-500 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 501-04 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *see also id.* at 509 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.) (noting the Court's "long hostility to commercial speech regulation of this type"). But the plurality expressed its discomfort in a most curious way, *allowing* the government to restrict speech to influence choice, as long as the government can demonstrate that the



results achieved will be "significant." *Id.* at 504-07 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).[2]

Justice Stevens and the Justices who joined him in *44 Liquormart* rightly found the government's use of censorship to influence consumer behavior troubling from a First Amendment standpoint. But the better solution is the one urged by Justice Thomas—to hold such a use of censorship to be "per se illegitimate." 517 U.S. at 518.

Restricting commercial speech to influence consumer behavior "strikes at the heart of the First Amendment." *Central Hudson*, 447 U.S. at 574 (Blackmun, J., concurring). Restricting commercial speech to "control" consumer behavior "strikes at the heart of the First Amendment" because it presumes that people cannot be trusted to use information wisely. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board. of Pharmacy*, 425 U.S. at 770. Equally problematic, as Justice Stevens noted in *44 Liquormart*, curtailing access to truthful information—for any purpose—may "'screen from public view the underlying governmental policy,'" *id.* at 500 (citation omitted), and "impede debate over central issues of public policy," *id.* at 503 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

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[2] Of these four cases involving speech restrictions imposed to dampen demand for a product or service, only in *Posadas*—where the speech restriction was upheld—was the legitimacy of the government's purpose necessary to the outcome of the case.

These flaws cannot be cured or mitigated, as the *44 Liquormart* plurality seemed to suppose, by requiring the government to make a heightened showing of efficacy under the third prong of the *Central Hudson* test. *See* 517 U.S. at 504-08. To the contrary, as Justice Thomas observed, the plurality's approach "seems to imply that if the State had been more successful at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld." *Id.* at 523 (concurring opinion). Nor do these flaws turn on whether a speech restriction can be characterized as a "complete" or "blanket" ban. If the First Amendment prevents the government from restricting speech to influence choice, it cannot be an answer that the government has sought to do so by restricting speech "only a little bit." Similarly, even if a speech restriction cannot be characterized as a "complete" or "blanket" ban, if the restriction is significant enough to affect behavior, it must be significant enough to impede debate over public policy.

For these reasons, the Court should make clear that the government may not restrict commercial speech to influence consumer choice, as long as the speech is truthful and the choice is lawful. Under the First Amendment, such a purpose is forbidden.

## II. THE FIRST AMENDMENT REQUIRES THE GOVERNMENT TO DEMONSTRATE THAT THE ADVERTISING IT SEEKS TO RESTRICT STIMULATES THE DEMAND IT SEEKS TO DAMPEN

In applying the third prong of the *Central Hudson* test, the court below assumed that prohibiting broadcast casino advertising would dampen demand because, relying on language in this Court's decisions, it simply assumed that such



advertising stimulates demand for gambling. The court did not consider itself bound to determine, as a factual matter, whether the advertising that Section 1304 prohibits in fact stimulates the demand the government seeks to dampen. Instead, it treated the proposition as something that could be "postulated." 149 F.3d at 340 n.14. *See also id.* at 340 (flatly asserting that "regulation of promotional advertising directly influences consumer demand").

In dispensing with the need to make the government shoulder its burden of demonstrating that Section 1304 satisfies the third prong of *Central Hudson*, the court pointed to what it characterized as "numerous assertions by [this Court] that the purpose and effect of advertising are to increase consumer demand and, conversely, that limits on advertising will dampen such demand." 149 F.3d at 336 (citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Posadas*, 478 U.S. at 342; and *Central Hudson*, 447 U.S. at 569).[3] Further citing *Posadas*, 478 U.S. at 342, the court also stated: "That the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it." 149 F.3d at 338.

When the government seeks to restrict advertising to reduce consumer demand, this Court's decisions do not relieve the government of its burden of proof under the third prong of *Central Hudson* by licensing courts to "postulate"

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[3] *See also id.* at 337 (referring to "the series of decisions [by this Court] that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised") (citing *Central Hudson*, 447 U.S. at 569).

that the advertising the government seeks to restrict stimulates the demand it seeks to dampen--or, correspondingly, that restricting that advertising will in fact dampen that demand. If courts had such license, third-prong analysis would become entirely pro forma whenever the government undertakes to restrict advertising to dampen demand, and the broadest advertising restrictions would become the easiest to justify. In that event, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-44 (1978).[4]

*Central Hudson* and its progeny stand for no such principle. In *Central Hudson*, the New York State Public Service Commission sought to reduce consumer demand for electricity by prohibiting the utility from promoting new goods and services (such as heat pumps) that might increase consumer use of electricity. The utility held a monopoly over the provision of electricity in its area of service, and

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[4] Ironically, the court below appeared to believe that the price advertising ban challenged in *44 Liquormart* was more difficult to justify under the third prong of the *Central Hudson* test precisely because it did not ban *more* speech. *See* 149 F.3d at 340. Instead of attempting to influence consumers directly by banning promotional advertising generally—which the court below plainly would have found to satisfy the third prong—Rhode Island prohibited only one piece of factual information from being communicated to consumers, in the hope that the result of this focused restriction would be to keep alcohol prices high, thereby discouraging consumption.



there was no dispute that the commercial speech in question was designed to stimulate overall use of electricity.

Here, it is not necessarily the case that the advertising the government seeks to restrict in fact operates to stimulate gambling overall. Specifically, the advertising the government seeks to restrict may operate not to stimulate people to gamble who would not otherwise gamble, or to stimulate people who already gamble to gamble more, but instead may operate merely to move people who gamble from one casino to another, or from one *form* of gambling to another. These are quintessential fact questions on which the government must be to required make a factual showing, including overcoming contrary evidence, to meet its burden under the third prong that its advertising restriction "will in fact" reduce gambling. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

In *Posadas*, the Court elevated the "commonsense connection" found by the Court in *Central Hudson* to what amounted to an irrebuttable presumption. In deferring to the legislature's "belief" that casino advertising to local residents "would serve to increase the demand for the product advertised"—without requiring a factual showing by the Commonwealth, and without conducting a searching inquiry of its own—the Court not only departed significantly from prior precedent, but sowed the seeds of future confusion. *Edge* then relied on *Posadas* for the proposition that the Government could "legislate[ ] on the premise that the advertising of gambling serves to increase the demand for the advertised product," notwithstanding the absence, as in *Posadas*, of any factual predicate for that conclusion in the particular case. *See* 509 U.S. at 434.

In sharp contrast to *Posadas* and *Edge* is the long line of cases following *Central Hudson* in which the Court has reiterated its holding that the "intuitive" belief that suppression of speech will further the government's ends cannot substitute for an adequate factual record, particularly where the factual basis for that belief has been put in issue. In *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), the Court emphasized that the third prong of the *Central Hudson* test is "critical," and "is not satisfied by mere speculation or conjecture." The government must offer evidence sufficient to "demonstrate that the harms it recites are real, and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71 (citing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985)). *Zauderer* rejected the State's arguments that "amount to little more than unsupported assertions; nowhere does the State cite any evidence or authority of any kind for its contention[s]," and the Court made clear that the government must demonstrate the "factual necessity" for its speech restrictions by presenting evidentiary support in the judicial proceeding relating to the factual basis for, and the operation of, the commercial speech restriction. *Id.* at 649-57; *see also Rubin*, 514 U.S. at 489-90. "[L]egislative findings" by a governmental body simply "do[ ] not foreclose" the "independent judgment [of the courts] of the facts bearing on an issue of constitutional law." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (court must consider whether "the evidence adduced by the [government] is sufficient" after "scouring the record" before the court).

In *44 Liquormart*, the Court disavowed the deferential approach to reviewing commercial speech restrictions that



*Posadas* had signaled, and reiterated that "speculation or conjecture" are "an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest" when "the State takes aim at accurate commercial information for paternalistic ends." 517 U.S. at 507 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.) (citing *Edenfield*, 507 U.S. at 770)); *see also id. at* 531-32 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring). In doing so, the Court returned to the fundamental principles embodied in *Central Hudson* and its progeny.

The confusion engendered by *Posadas* remains, however, as the court below demonstrated by holding that "*44 Liquormart* does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised." 149 F.3d at 337. *Posadas, Edge*, and *Central Hudson*, itself, have been and *continue* to be cited by the lower federal courts as a basis for relieving the government of its burden of proof under the third prong of *Central Hudson*—even in the teeth of strong record evidence refuting the claimed link between advertising and demand and demonstrating that the purpose and effect of the advertising the government seeks to restrict are to increase one firm's share of the market at the expense of its competitors, rather than to stimulate demand among those who would not otherwise purchase *any* brand of the advertised product. [5]

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[5] *See, e.g., Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747-50 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)

(continued...)

(...continued)
(rejecting expert testimony that advertising merely affected brand loyalty and market share in favor of "the judicial notice approach taken in *Central Hudson*" that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect"); *Penn Adver. of Baltimore, Inc. v. City of Baltimore*, 862 F. Supp. 1402, 1410 (D. Md. 1994) (accepting "judicially-recognized proposition that advertising increases consumption"), *aff'd*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Anheuser-Busch, Inc. v. City of Baltimore*, 855 F. Supp. 811, 818 (D. Md. 1994) (relying on the "Supreme Court's continued deference to a legislative judgment that advertising increases consumption" in rejecting evidence of record refuting connection between advertising and demand and showing that purpose and effect of advertising was to increase market share rather than to increase demand); *aff'd*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp.2d 1225, 1231 (W.D. Wash. 1998) (citing *Central Hudson* and *Posadas* for the proposition that the court can take judicial notice of the fact "that advertising increases sales" despite evidence of record that consumption was actually higher in certain areas with an advertising ban); *Missouri Retailers Assoc. v. City of St. Louis*, No. 4:98CV1514 ERW, slip op. at 36-37 (E.D. Mo. Dec. 10, 1998) (relying on presumption of a connection between advertising and demand despite expert testimony that advertising is designed to increase market share and that restricting advertising would not decrease demand); *Aimes Publications v. United States Postal Service*, 1988 WL 19618 (D.D.C. 1988) (citing *Posadas* in support of "undisputed fact" that advertisements encourage participation in lotteries); *Association of Charitable Games of Mo. v. Missouri Gaming Comm'n*, 1998 WL 602050, *9 (W.D. Mo. 1998) (relying on *Edge* in support of proposition that "the purpose and effect of advertising are to increase consumer demand," but striking advertising regulation at issue under *44 Liquormart*
(continued...)



Reliance by the lower courts on the "presumption" supposedly derived from *Central Hudson* concerning the link between advertising and consumption, and the efficacy of advertising restrictions as a means of reducing demand, is in fact fundamentally inconsistent with the holding of *Central Hudson* and meaningful First Amendment protection for commercial speech. If third-prong review is to have any meaning when the government seeks to restrict advertising to dampen consumer demand, the government must be required to demonstrate by evidence that the advertising it seeks to restrict in fact stimulates the demand it seeks to dampen, and that restricting that advertising will in fact dampen that demand in a direct and material way. Those challenging an advertising restriction must be allowed to rebut the government's evidence and to offer contrary evidence of their own, and the reviewing court must then conduct a searching review of the record and make its own independent judgment of what the evidence shows.

(...continued)
because alternative non-speech-restrictive means were available to achieve State's purpose); *Eller Media Co. v. City of Oakland*, No. C98-2237 FMS, slip op. 11 (N.D. Cal. Jan. 15. 1999) ("The Court appears to require a lesser third-prong showing in cases where the means-end relationship is intuitive"); *id.* at 13-14 ("By now, the correlation between advertising and general consumption is well established. * * * Nothing in *44 Liquormart* or the cases leading up to it requires a court-mediated 'battle of the experts' to confirm matters that fall squarely within the realm of common sense.").

## III. THE GOVERNMENT MAY NOT RESTRICT SPEECH TO ACHIEVE NON-SPEECH-RELATED ENDS EXCEPT AS A LAST RESORT

Applying the fourth prong of *Central Hudson*, the Court in *44 Liquormart* made it clear that the government may not restrict commercial speech *at all* if non-speech restrictive alternatives are available to serve the government's interest. The court below refused to recognize this teaching.

The Court in *44 Liquormart* struck down two Rhode Island laws that prohibited the advertising of retail prices of alcohol beverages anywhere other than at the point of purchase. The asserted purpose of the price-advertising ban was to discourage alcohol consumption. Seven Justices concluded that the advertising ban failed the fourth prong of *Central Hudson* because the State could have pursued its goal through "alternative forms of regulation that would not involve any restriction on speech." 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 528-30 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment). *See also id.* at 524-25 (Thomas, J., concurring in the judgment).

As Justice Stevens observed in his opinion:

> "[A]ttempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another



> means that the government may use to achieve its ends." *Id.* at 511.

Justice Stevens explained why "[t]he State * * * cannot satisfy the requirement that its restriction on speech be no more extensive than necessary":

> "It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices could be maintained either by direct regulation or by increased taxation. * * * Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.
>
> "As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal." *Id.* at 507.

Justice O'Connor made essentially the same point:

> "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

* * *

"The fit between Rhode Island's method and [its temperance] goal is not reasonable. If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal—methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers. * * * A tax, for example, is not normally very difficult to administer and would have a far more certain and direct effect on prices, without any restriction on speech. The principal opinion [by Justice Stevens] suggests further alternatives, such as limiting per capita purchases or conducting an educational campaign about the dangers of alcohol consumption. The ready availability of such alternatives— at least some of which would far more effectively achieve Rhode Island's only professed goal, at comparatively small additional administrative cost—demonstrates that the fit between ends and means is not narrowly tailored." *Id.* at 529-30 (citations omitted); *see also id.* at 524-25 (Thomas, J., concurring).

In sum, when the government can advance its goal through "direct regulation" of conduct or other non-speech-restrictive means, *44 Liquormart* teaches that the government may not pursue its goal by restricting otherwise lawful speech.

The court below sought to avoid this teaching, offering five reasons why it believed that *44 Liquormart* does not compel the government to pursue non-speech-restrictive



options in lieu of a speech restriction in this case. None of those reasons is persuasive.

*First*, the court below implied that the teaching of *44 Liquormart* is inapplicable if the speech restriction in question is not a "blanket" advertising ban but, as here, merely restricts advertising in a single medium. 149 F.3d at 340. Nothing in *44 Liquormart* supports such a distinction. The essence of the Court's reasoning in *44 Liquormart* is that speech restrictions are constitutionally disfavored and that non-speech-restrictive alternatives must be pursued whenever possible.[6]

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[6] The court's attempt to analogize Section 1304 to a "time, place, or manner" regulation (149 F.3d at 340) will not fly. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court held that an ordinance banning "For Sale" and "Sold" signs on front lawns was not a "time, place, or manner" restriction because the ordinance applied to signs "based on their content." "That the proscription applies only to one mode of communication * * * does not transform this into a 'time, place, or manner' case." *Id.* at 94. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), invalidating a federal law prohibiting the mailing of unsolicited contraceptive advertisements, the Court stated that the statute in question could not be characterized as a "time, place, or manner" restriction "in light of [its] content-based prohibition." 463 U.S. at 69. Finally, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court held that, because the challenged newsrack ordinance was neither content-neutral nor narrowly tailored, it could not be justified as a legitimate time, place, or manner restriction, *regardless* of whether it left open ample alternative channels of communication. *See* 567 U.S. at 929.

*Second*, the court below suggested that *44 Liquormart* does not apply to an advertising restriction that "directly influences consumer demand, as compared with the indirect market effect criticized in *44 Liquormart*." 149 F.3d at 340. This mixes apples and oranges. The price advertising ban at issue in *44 Liquormart* was held to violate the fourth prong of the *Central Hudson* test not because it achieved its purpose indirectly but because alternatives were available to achieve the same purpose without restricting speech at all.

*Third*, the court below suggested that *44 Liquormart* does not require the government to pursue non-speech-restrictive options in lieu of speech restrictions if the efficacy of the non-speech-restrictive options is "purely hypothetical." 149 F.3d at 340. This incorrectly places on the party challenging a speech restriction the burden of demonstrating its invalidity, when the rule is that the "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger*, 463 U.S. at 71 n.20.

*Fourth*, the court below appeared to say that *44 Liquormart* does not require the government to pursue non-speech-restrictive alternatives when those alternatives would have to "compete" with speech promoting activities the government seeks to discourage. 149 F.3d at 340. Apart from having no support in *44 Liquormart*, the fact that a federal appeals court believes that truthful speech can be suppressed to make it easier for the government to implement its policies is startling, to say the least.

*Fifth*, the court below concluded that banning casino advertising even in states where casino gaming is legal is a "narrowly tailored" means of reinforcing the policies of non-



gambling states. 149 F.3d at 340. With respect, this is mere assertion, and it is incorrect.[7] In addition to banning casino advertising in states where casino gambling is illegal, Congress could, for example, provide federal support to law-enforcement authorities combating illegal gambling in non-gambling states, and could assist the non-gambling states in the dissemination of messages admonishing against participating in such gambling. A law cannot be considered "narrowly tailored" that prohibits advertising for an activity that is legal in the jurisdiction where the advertising originates, to consumers who may lawfully engage in that activity, on the ground that people in jurisdictions where the activity is unlawful may overhear it.

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[7] The court, again improperly shifting the constitutional burden, penalized the broadcasters for not identifying any non-speech-related alternatives to Section 1304 that would assist anti-gambling states. *Id.*

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the Court should reinforce the First Amendment's protection of commercial speech as discussed herein.

Respectfully submitted,

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February 25, 1999

(7)



No. 98-387

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

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GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN ADVERTISING FEDERATION IN SUPPORT OF PETITIONERS

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN ADVERTISING FEDERATION IN SUPPORT OF PETITIONERS

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This brief is respectfully submitted pursuant to Rule 37 urging that the Court reverse the decision below of the United States Court of Appeals for the Fifth Circuit on the grounds that the federal ban on broadcasting of casino gambling, codified at 18 U.S.C. § 1304, violates the Petitioners' rights under the First Amendment to the Constitution of the United States.[1]

### INTEREST OF *AMICUS CURIAE*

The *amicus* herein represents thousands of advertising agencies, advertisers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amicus* presents its views to the Court. The *amicus* is the American Advertising Federation ("AAF"), a national trade association that traces its origins to 1903 and represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States. The *amicus* respectfully submits this brief to vindicate the principle that com-

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[1] Counsel for both Petitioner and Respondents have consented to the participation of the *amicus* in this case, as evidenced in letters filed with the Court pursuant to Supreme Court Rule 37. No party wrote or financially contributed to the preparation of this brief.

mercial speech should be entitled to the same constitutional protection as non-commercial speech.

## SUMMARY OF ARGUMENT

The text and history of the First Amendment, as well as the "long accepted practices of the American people," support the view that truthful commercial messages about lawful products and services should be accorded the same constitutional protection as is non-commercial speech. The text, of course, does not distinguish between commercial and non-commercial aspects of the press. The lack of a distinction for constitutional purposes is confirmed by the practice of state legislatures at the time the Bill of Rights was ratified. Although states regulated trade, the only restrictions on advertising concerned the promotion of unlawful activities, such as lotteries or horse-racing. This absence of state regulation is consistent with the colonial conception of a "free press," which included advertising, and with the Framer's political philosophy, which equated liberty and property. Full protection of commercial speech is also consistent with the history of the First Amendment, which was adopted in part to bar stamp acts that imposed taxes directly on advertising.

Advertising grew essentially unchecked and unregulated throughout the nineteenth century. While the number of states and statutes increased, advertising continued to be barred only where it was used to publicize unlawful products, services, or activities. In addition, towards the end of the century, some restrictions began to be adopted limiting false and misleading advertising. This Court's treatment of truthful advertising during and immediately after Reconstruction was indistinguishable from the treatment accorded other forms of speech.

The Progressive Era witnessed both an increase in the power of advertising and attempts to limit it. But even these attempts overwhelmingly focused on ensuring that advertising was truthful and not misleading. During this



time, courts analyzed contraints on commercial speech under the rubric of substantive due process. This confusion of categories caused the Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to erroneously treat restrictions on advertising as solely economic regulations subject only to rational basis scrutiny.

That error, which is in part perpetuated by this Court's continued distinction between commercial and non-commercial speech, conflicts with the "long accepted practices of the American people." Those practices—particularly state legislative practice at the times the First and Fourteenth Amendments were ratified by the states—support the contention that truthful, commercial messages about lawful products and services are entitled to full First Amendment protection. Under that standard, the federal ban on broadcast advertising of casino gambling is plainly unconstitutional.

## ARGUMENT

At issue in this case is the federal proscription of broadcast advertising of "any advertisement or information concerning any lottery, gift, enterprise, or similar statute offering prizes depending in whole or in part upon lot or chance." 18 U.S.C. § 1304. The government argues that this regulation is constitutional because "the statute is not impermissibly restrictive." Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 19. This argument stems from the perception that commercial speech occupies some "subordinate position in the scale of First Amendment values." *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989).[2] The *amicus* demonstrates herein that, throughout most of this nation's history, the American people made no distinction between commercial and non-commercial speech.

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[2] This "subordinate position" is exemplified by this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

This *amicus* has previously addressed the central importance of advertising to the historical development of the American press and to the concept of the freedom of speech and of the press. *See, e.g.*, Brief of *Amici Curiae* American Advertising Federation, *et al.*, *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997); Brief of *Amici Curiae* American Advertising Federation, *et al.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In *44 Liquormart*, the Court acknowledged the importance of that historical context in unanimously striking down a state prohibition on advertising of liquor prices. The plurality opinion specifically referred to the historical materials discussed in our *amicus* brief, noting that:

> Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. . . . Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

*Id.* at 1504 (Stevens, Kennedy, Souter & Ginsberg, J.J.) (citations omitted). Justice Thomas, relying in part on the historical analysis submitted by this *amicus* rejected the notion that there was any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 1518 (Thomas, J., concurring in part and concurring in the judgment) (citing Brief of *Amici*, American Advertising Federation, *et al.*).

Justice Scalia, concurring in the judgment, noted his "discomfort with the *Central Hudson* test," as well as his "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 1515 (Scalia, J., concurring in the judgment). Justice Scalia found the historical material submitted by AAF, *et al.*, "consistent with First Amendment protection for commercial speech, but certainly not dispositive." *Id.* He stated that "the long accepted practices of the American people" were therefore central to interpreting the First Amendment, including (1) state legislative practices at the time the First Amendment was adopted; (2) state legislative practices at the time of adoption of the Fourteenth Amendment; and (3) "any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field." *Id.*



In this brief, *amicus curiae* reviews the relevant history in effort to address these issues. The *amicus* respectfully submits that the state legislative history and practice, like the available evidence surrounding the understanding of the generation of the Framers, supports the proposition that, until relatively recently, the American people did not recognize a distinction in the protections afforded "commercial" and "non-commercial" speech, other than the advertising of illegal activities and the protections afforded against fraudulent or misleading claims.

## I. FULL PROTECTION OF COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT IS CONSISTENT WITH THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT AND THE PREVALENCE AND IMPORTANCE OF ADVERTISING AT THE TIME OF THE FRAMING.

The development of a free press and of a commercial, advertising-driven press were inextricably linked. Verner W. Crane, "Introduction" to *Benjamin Franklin's Letters to the Press, 1758-1775*, at xi, xvi (Verner W. Crane ed., 1950) ("It was a commercial age, and [it] produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would not have occurred to colonial Americans.

**A. Advertising Was An Integral Part of the "Press" in Colonial America.**

The interrelationship between editorial and advertising content in the eighteenth century press illustrates the fallacy of differentiating for constitutional purposes between commercial and non-commercial speech. American newspapers began to emerge only as colonial business and industry began to grow. *See* Edwin Emery & Michael Emery, *The Press and America* 19 (1978). As small industries developed a need to inform the public of their wares, printers began publishing newspapers to spread that information. As one commentator has observed, "[w]ell before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." James Playstead Wood, *The Story of Advertising* 85 (1958). Advertising was both a major impetus and means for establishing regularly published newspapers in colonial America.

The majority of the advertisements which appeared in colonial newspapers would be considered "commercial speech" today. "The colonial press regularly carried reputable medical advertisements, as well as those for books, cloth, empty bottles, corks, and other useful goods and services." Kent R. Middleton, "Commercial Speech in the Eighteenth Century," *in Newsletters to Newspapers: Eighteenth-Century Journalism* 277, 282 (Donovan H. Bond & W. Reynolds McLeod eds., 1997). Without these advertisements, the colonial press so important to the Revolutionary cause would almost certainly have been less vibrant, if it would have existed at all because, like today, "[a]dvertising represented the chief profit margin in the newspaper business." Frank Luther Mott, *American Journalism—A History of Newspapers in the United States through 250 Years: 1690-1960* 56 (3d ed. 1963).

Among the goals of the first attempted colonial newspaper was the promotion of "Businesses and Negotiations."



Publick Occurrences, Both Foreign and Domestick, Sept. 25, 1690, at 1, *quoted in* Frank Presbrey, *The History and Development of Advertising* 119 (1929). The inaugural issue of the first successful American newspaper contained the following solicitation:

> This News-Letter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c to be Sold or Let; or Servants Run-Away, or Goods Stole or Lost; may have the same inserted at a Reasonable Rate.

Boston Newsletter, April 24, 1704, *quoted in* Wood, *supra*, at 45. The next week's issue of the *Boston Newsletter* contained paid entries that sought the return of two lost anvils, offered a bounty for capturing a thief, and listed a "very good Fulling Mill to be Let or Sold" in Oyster Bay, New York. *Id.* at 45-46.

When the *New-Hampshire Gazette* was launched in 1756, its publisher said that the paper would

> contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect.

New Hampshire Gazette, October 7, 1756, *quoted in* Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 49 (1988). True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy. Lawrence C. Wroth, *The Colonial Printer* 234 (1938). Often, more than half of the standard colonial newspaper was taken up by advertising. In 1766, 70% of Hugh Gaine's *New-York Mercury* consisted of advertising. A. Lee, *The Daily Newspaper in America* 32 (1937).

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements. Presbrey, *supra,* at 161. The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The Boston, New York, and Philadelphia newspapers, like most dailies in these years, "used page one for advertising, sometimes saving only one column of it for reading matter." Mott, *supra,* at 157.

Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal interest to readers and treated the same. Middleton, *supra,* at 281. As one commentator observed:

> Advertisements had as much interest as the news columns perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.

Presbrey, *supra,* at 154.

Advertisements were also thought to have independent value in educating and informing the reading public. In the words of prominent printer-historian Isaiah Thomas, editor of an ardently pro-Revolutionary newspaper

> [A]dvertisements are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.



*History of Printing in America with a Biography of Printers, and an Account of Newspapers* (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328 (1958). As a source of information to the population at large and income to colonial printers, advertising was both influential and plentiful during the latter part of the colonial era.

### B. The Absence of Advertising Restrictions Is Consistent With The Colonial Conception of a "Free Press" That Included Advertising.

#### 1. *The challenges to early Stamp Acts evidences the colonial conception of a "free press" including advertising.*

Given the prevalance of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising. Indeed, one of the major precipitating events of the American Revolution involved a defense of advertisements.

As this Court has recognized, one of the best-known statements in defense of a free press—Franklin's famous *Apology for Printers*—was written in response to an attack on an advertisement printed by Franklin.[3] Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette,* Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ

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[3] An *Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 172 (Albert Henry Smith ed., 1907). In 1731, Franklin printed a politically incorrect advertising notice that was distributed as a standalone commercial handbill. The paper simply proposed a commercial transaction by seeking additional freight and passengers for a ship. At the bottom of the advertisement was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *Id.* at 176. This handbill outraged the local clergy (the "Black Gowns"). In response to attacks on the advertisement, Benjamin Franklin published his *Apology* which was at that time, "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, "Printers and the American Revolution," *in The Press and the American Revolution* 20 (B. Bailyn & J.B. Hench eds., 1980).

in opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 174 (Albert Henry Smith ed., 1907). To Franklin, even those "opinions" in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of commercial speech.

In addition, the British Stamp Act of 1765 assessed a tax on each printed copy of a newspaper and added a two shilling tax for each advertisement therein. As one commentator noted, "[B]y any standard [this amount] was excessive, since the publisher himself received only from 3 to 5 [shillings] and still less for repeated insertions." Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764-1776* 68 (1966). This tax galvanized the colonial press against the British government:

> Stamp duties also, imposed on every commercial instrument of writing-on *literary productions*, and, *particularly*, on *newspapers*, which of course, will be a great discouragement to *trade*; an obstruction to *useful knowledge* in *arts, sciences, agriculture*, and *manufactures*; and a prevention of *political information* throughout the states.

*Objections by A Son of Liberty*, New York J., Nov. 8, 1787, *reprinted in* 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed., 1981). The opposition of newspapers was based largely, if not primarily, on their concern that it encroached on the freedom of expression.[4]

[4] In reacting to the Stamp Act, the Town of Worcester directed its representatives in the Massachusetts Assembly to "take special care of the LIBERTY OF THE PRESS." Schlesinger, *supra*, at 70; *see also* Connecticut Gazette, *quoted in id.* (enjoining its readers that "[t]he press is the test of truth, the bulwark of public safety, the guardian of freedom, and the people ought not to sacrifice it."); New York Gazette or Weekly Post-Boy, Nov. 7, 1765, *quoted in id.* (flaunting its motto, "The United Voice of all His Majesty's *free* and *loyal* subjects in America-LIBERTY, PROPERTY, and *no* STAMPS.").



Thus, the repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

After the Revolution, and only five years after adopting a state constitution explicitly guaranteeing freedom of the press, Massachusetts enacted a similar stamp tax on newspapers and newspaper advertisements. Eric Nessier, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 264 (1985) (citing Clyde A. Duniway, *The Development of Freedom of Press in Massachusetts* 136 (1966)). These taxes were widely denounced as, in printer Isaiah Thomas's words, an "unconstitutional restraint on the Liberty of the Press." Isaiah Thomas, Essex J., Apr. 19, 1786, *quoted in* Carol S. Humphrey, *"That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press 1783-1788*, 14 Journalism Hist. 34, 37 (1987). Repeal of the advertising tax in 1786 was also cited as a triumph for freedom of the press. *Id.*; *see also Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (noting that "[t]he framers were likewise familiar with the then recent Massachusetts episode; and . . . that occurrence did much to bring about the adoption of the [First Amendment]").

***2. State trade regulations restricting only unlawful products and services evidences the colonial conception of a "free press" including advertising.***

The practices of state legislatures around the time of the First Amendment's ratification provide further evidence that the generation of the Framers did not distinguish between the constitutional status of commercial and noncommercial speech.[5] Indeed, state statutes in effect at this

[5] All powers not delegated to Congress were reserved to the people and the states, U.S. Const. amends. IX, X, and the First Amendment explicitly limited Congress's authority over speech and

time did not restrict truthful commercial messages about lawful products or services.[6] Rather, consistent with the constitutions of the ten states that explicitly protected the freedom of the press,[7] advertising was limited only when used to promote products, services, or activities that were themselves unlawful.

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the press. As such, it is unlikely that the federal government was granted greater power to restrict speech than existed in the states. The fact that, as discussed below, state legislatures did not regulate truthful advertising of lawful products and services suggests that the federal government could not regulate such speech because advertising was regarded as within "the freedom of speech and of the press."

[6] This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. The Public Statute Laws of the State of Connecticut (1808); Laws of Maryland (1811); The Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 23, 1807 (1807); The Laws of the State of New Hampshire (1797); The Laws of the State of New Jersey (1800); Laws of the State of New York (1802); The Public Acts of the General Assembly of North Carolina (1804); Digest of the Acts of the General Assembly of Pennsylvania (1841); The Public Laws of the State of Rhode-Island and Providence Plantations (1798); The Public Law of the State of South Carolina (1790); Laws of the State of Vermont (1797); Collection of All Such Acts of the General Assembly of Virginia (1803). All compilations are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

[7] Decl. of Rights para. XXIII (Del. 1776); Ga. Const. of 1798 art. IV, § V; Decl. of Rights para. XXXVIII (Md. 1776); Decl. of Rights para. XVI (Mass. 1780); Bill of Rights art. XXII (N.H. 1783); Decl. of Rights para. XV (N.C. 1776); Decl. of Rights para. XII (Pa. 1776); Decl. of Rights. § 7 (S.C. 1778); Decl. of Rights ch. 1, art. XIII (Vt. 1777); Decl. of Rights para. XII (Va. 1776). Pennsylvania and Vermont connected that provision to protection for freedom of speech. *See generally* Bogen, *infra*, at 441 n.55. Of the remaining four states, Rhode Island and Connecticut had not drafted state constitutions, and New York and New Jersey did not provide specific state constitutional guarantees of freedom of press and speech. *See* Leonard A. Levy, *Emergence of a Free Press* 189 (1985).



Early statutes show efforts to regulate merchants and shopkeepers,[8] liquor and taverns,[9] potash,[10] malt,[11] a variety of commodities,[12] attorneys,[13] and doctors.[14] Among other things, these statutes required licenses, prevented charging of unreasonable prices, and set standards for inspection and weighing of commodities. The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, tempered by the doctrine of *caveat emptor*. *See, e.g., Borrekins v. Bevan*, 3 Rawle 23, 37 (Pa. 1831) ("A sample, or description in a sale note, advertisement,

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[8] *See, e.g.*, Act for Punishing and Preventing Oppression, 1635 (amended 1730), The Public Statute Laws of Connecticut 544 (1808).

[9] *See, e.g.*, Act Regulating Licensed Houses, 1791, The Laws of the State of New Hampshire 373-76 (1797); Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, 1801, Laws of the State of New York 439-43 (1802); Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, The Public Acts of the General Assembly of North Carolina 122-23 (1804).

[10] *See, e.g.*, Act to Regulate the Exportation of Potash and Pearl Ash, 1792, The Laws of Maryland 119-92 (1811); Act to Regulate Flax-Feed, Pot-ash and Pearl Ash for Exportation, 1785, The Laws of the State of New Hampshire 377-79 (1797).

[11] *See, e.g.*, Act for the Better Making and Measuring of Malt, 1700, The Laws of the Commonwealth of Massachusetts 186 (1807).

[12] *See, e.g.*, Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, 1785, The Laws of the Commonwealth of Massachusetts 320-23 (1807); Act to Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Staves and Fire-wood, and to Regulate the Weighing of the Merchandise in this Province, 1746, The Public Law of the State of South Carolina 208-10 (1790).

[13] *See, e.g.*, Act Regulating the Admission of Attornies, 1785, The Laws of the Commonwealth of Massachusetts 318-19 (1785).

[14] *See, e.g.*, Act to Regulate the Practice of Physic and Surgery, 1783, Laws of the State of New Jersey 7-8 (1783).

bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they described"); *see also infra* Section I.C.3; *see generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931).

The sole limitations placed on advertising restricted the promotion of certain prohibited activities. For example, during the period surrounding the ratification of the Bill of Rights, several states prohibited or restricted lotteries as well as their advertisement and promotion.[15] Massachusetts, for example, enacted a statute in 1785 that imposed, with respect to unauthorized—and therefore illegal—lotteries, separate fines for setting up a lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had." Act for the Suppression

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[15] *See, e.g.*, Act For the Prevention of Lotteries, 1792, the Laws of Maryland 189-90 (1811) (prohibiting lotteries, as well as their "propos[al] to the public," absent permission of the legislature); Act for the Suppressing of Lotteries, 1791, the Laws of the State of New Hampshire 339 (1805) (separate penalties for setting up a lottery and "aiding or assisting . . . by printing, or any other ways publishing an account thereof"); Act of Feb. 13, 1797, The Laws of the State of New Jersey 227-28 (1800) (fining those who print, write or publish any account of where tickets are available, or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery."); Act to Prevent Private Lotteries, to remit certain Penalties, and to Repeal the Acts therein Mentioned, 1783, Laws of the State of New York 35-38 (1802) (providing penalties for being "in any way concerned" with lotteries not authorized by the state, including "printing, writing, or any other ways publishing an account thereof"); Act for Suppressing and Preventing of Private Lotteries, 1762, The Public Law of the State of South Carolina 256-67 (1790) (fining anyone "who shall make, writ, print or publish, or cause to be written or published, any scheme or proposal" for a private lottery). Only Pennsylvania completely outlawed lotteries (and their advertisement). Act for the More Effectual Suppressing and Preventing of Lotteries, 1762, A Digest of the Acts of the General Assembly of Pennsylvania 584-85 (1841) (setting 20 pound fine for, *inter alia*, advertising or causing to be advertised any lottery).



of Lotteries, 1785, The Laws of the Commonwealth of Massachusetts 252-53 (1807).

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited staging and advertising horse races. Act to Prevent Horse Racing, 1803, The Public Statute Laws of the State of Connecticut 381-82 (1808); Act Against Horse Racing, 1820, A Digest of the Acts of the General Assembly of Pennsylvania 450-51 (1841). And Rhode Island prohibited the erection of a sign "for the keeping of a public house" without first obtaining an innkeeper's license. Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1728, The Public Laws of the State of Rhode-Island and Providence Plantations 391-94 (1798). Despite these regulations, however, the state legislatures were not opposed to advertising in general.

### 3. *Common law exceptions to free commercial speech involving false or misleading speech evidences the colonial conception of a "free press" including advertising.*

The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation (as well as the torts of libel and slander). Sir William Blackstone acknowledged that "every kind of fraud is equally cognizable . . . in a court of law." 3 William Blackstone, Commentaries *431. Justice Story's treatise *Equity Jurisprudence* addressed that "old head of equity," the law of misrepresentation, in great detail:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage of him; in every sense there is a positive fraud in the truest sense of the terms.

Joseph Story, *Equity Jurisprudence*, § 192 (1836). That liability could accompany this category of speech demon-

strates that it was beyond what was understood to be constitutionally protected. A proposed draft of the First Amendment by Thomas Jefferson shows that the free press envisioned by the Framers did not encompass the publication of falsehoods—commercial or noncommercial:

> The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations.

15 *The Papers of Thomas Jefferson* 367, 367 (J. Boyd ed., 1958).

Advertisements of unlawful products were also outside the scope of constitutional protection. According to Blackstone, the common law considered it a criminal offense to "procure, counsel, or command another to commit a crime." 4 William Blackstone, Commentaries *36 (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269, 276 (K.B. 1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases."); *see generally Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Advertising unlawful products could thus be prohibited at common law as solicitation to commit a crime.

#### 4. *Fully protecting advertising is consistent with the Framers' political philosophy, which equated liberty and property.*

The inextricable link between commercial and other speech is also reflected in the Framers' political philosophy, which generally equated liberty and property rights. In seventeenth and eighteenth century England there were two reigning justifications for free expression: the idea that free speech "was an instrument to some collective good" and the notion that free speech was a "natural property right of the individual." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 58 (1996).



In this tradition, freedom of speech and property rights were seen as essential parts of an individual's liberty, an understanding derived from the philosophical writings of John Locke, who defined the "state of perfect freedom" as the ability of people

> to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man.

John Locke, *The Second Treatise on Government* 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 1975).[16] As one newspaper commentator put it.

> Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the enjoyment of the other.

Boston Newsletter, February 16, 1772, *quoted in* Clinton Rossiter, *Seedtime of the Republic* 379 (1953).

The libertarian Cato drew on Locke in equating liberty and property.[17] Applying this view to the freedom of

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[16] George Mason's Virginia Declaration of Rights further evidences this Lockean linkage of liberty and property, stating that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety." Decl. of Rights § 1 (Va. 1776).

[17] *Cato's Letters* were published from 1720 to 1723 and widely circulated in the colonies as "the most popular, quotable, esteemed source of political ideas in the colonial period." Rossiter, *supra*, at 141. His articulation of the tie between property rights and free speech was enormously influential in colonial America. Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988). In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983).

expression, Cato articulated the importance of free speech and its inextricable link with property rights:

> This sacred Privilege is so essential to free Government, that the Security of Property, and the Freedom of Speech, always go together; and in those wretched countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own.

John Trenchard & Thomas Gordon, 1 *Cato's Letters* 110 (Ronald Harrow ed., Liberty Classics ed. 1995) (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable from Publick Liberty, Feb. 4, 1720).

Distinguishing between the value of commercial and non-commercial speech thus would never have occurred to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. James Madison, the drafter of the First Amendment, echoed Locke and Cato, writing:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*
>
> In the former sense, a man's land, or merchandise, or money is called his property.
>
> In the latter sense, a man has a property in his opinions and the free communication of them.

James Madison, *Property,* The National Gazette, Mar. 27, 1792, *reprinted in* James Madison, 14 *Papers of James Madison* 266-68 (Robert A. Rutland & Thomas Mason eds., 1983).

This linkage of liberty and property rights strongly suggests that colonial Americans viewed the First Amendment as protecting far more than just political speech. As one contributor writing under the pseudonym "Philalethes" declared in Boston's *Herald of Freedom* in 1788, Americans

> are nurtured in the ennobling idea that to think what they please, and to speak, write and publish



> their sentiments with decency and independency on every subject, constitutes the dignified character of Americans.

Boston Herald of Freedom, Sep. 15, 1788, *quoted in* Smith, *supra*, at 19. Commercial matters were also to be counted among the "subjects" to which the freedom of speech obtained. As leading Anti-Federalist Richard Henry Lee said in his demand for a bill of rights, "A free press is the channel of communication as to mercantile and public affairs." Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962). In keeping with this recognition that advertising was a critical part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no distinction between the commercial and non-commercial aspects of the press.

## II. THE PERVASIVENESS OF ADVERTISING AND STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT ARE CONSISTENT WITH THE VIEW THAT COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

An examination of state legislative practices at and around the time the Fourteenth Amendment was ratified confirms the conclusion that truthful messages about lawful products or services are entitled to full protection. This period marked a robust increase in the prominence and utility of advertising. States, while adopting some restrictions on advertising that reflected the general shift from the common law tradition to statutory law, *see, e.g.*, Morton Keller, *Affairs of State* 347 (1977), continued to focus their regulatory efforts on limiting advertising for illegal products and services.[18]

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[18] This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law at the time of incorporation. Although unable to obtain the State

**A. Commercial Speech Was An Integral Part of American Life During Reconstruction.**

Advertising was "vigorous and thriving by the mid-nineteenth-century mark." Wood, *supra*, at 158. As one publisher in 1847 observed, "advertising is news. People wanted to read it just as much as they wanted to read the reports of the day's happenings." *Id.* at 159-60. To illustrate, a typical issue of the *New York Herald* in 1860 carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter, only advertising. *Id.* at 166-167; Mott, *supra*, at 397-98, 593-94. Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers. Mott, *supra*, at 397; Presbrey, *supra*, at 259. Nonetheless, even in 1869, the *New York Herald* typically held eight columns of news, and fifty columns of advertising. Wood, *supra*, at 169.

Although the Civil War may have pushed advertising from the front page, the demonstrated ability of advertising to sell Union war bonds led to a vast expansion in advertising's use. Presbrey, *supra*, at 253. A year after the close of the Civil War:

> Every rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.

Wood, *supra*, at 182; *see also* Presbrey, *supra*, at 255.

Advertising's prominence also led to other innovations including the first advertising agent in 1841, the first newspaper directory in 1869, and the first market survey in 1879. G. Allen Foster, *Advertising: Ancient Market Place to Television* 48-49, 126-31 (1967); Wood, *supra*, at 142. In 1867, *Galaxy Magazine* described advertising in the United States as having arrived at the point at which

> the names of successful advertisers have become household words where great poets, politicians, philosophers and warriors of the land are as yet unheard of; there is instant recognition of Higg's saleratus and Wigg's soap even where the title of Tennyson's last work is thought to be "In the Garden," and Longfellow understood as the nickname of a tall man.

Presbrey, *supra*, at 255. Advertising had become a major part of American culture.

**B. State Legislative Practice During Reconstruction Is Consistent With Full First Amendment Protections for Truthful Commercial Speech Promoting Lawful Products and Services.**

Even as advertising emerged as an increasingly powerful societal force, state governments allowed it to grow unchecked, primarily restricting the promotion of illegal products or services only.[19] The restrictions on advertising that did exist were aimed at the illegality of the advertised conduct, rather than advertising itself. For example, Delaware barred advertising by unlicensed lottery retailers only. Del. Rev. Stat., ch. 98, v. 12, § 6 (1874). Similarly, Vermont barred the advertising of lotteries "not granted by the legislature of this state or of the United States." Vt. Stat., tit. 34, ch. 119, § 7 (1870).

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Code of Wisconsin, *amicus* did examine the other thirty-seven states admitted to the Union by 1880, as well as the Territorial Codes of Utah, Washington, Wyoming, and New Mexico.

[19] For example, as before, a number of states restricted lottery advertising. *See, e.g.*, Cal. Penal Code § 323 (1872); Conn. Gen. Stat., tit. 12, § 150 (1866); Del. Rev. Stat., chap. 98, v. 12, § 6 (1874); Digest of Laws of Fla., ch. 80, § 4 (1881); Iowa Code § 4043 (1873); Compiled Laws of Kan., ch. 31, § 342 (1885); Ky. Rev. Stat., ch. 28, art. 21, § 4 (1860 & Supp. 1866); Me. Rev. Stat., tit. 11, ch. 128, § 13 (1884); Md. Code, art. 30, § 114 (1860); Miss. Rev. Code § 2605 (1871); Compiled Laws of Nev. § 2498 (1873); N.Y. Rev. Stat., ch. 20, tit. 8, § 53 (1875); Ore. Gen. Laws, Crim. Code, ch. 8, § 661 (1874); Compiled Laws of Terr. of Utah § 2002 (1876); Vt. Gen. Stat., ch. 119, § 7 (1870).

In response to an aggressive anti-abortion campaign beginning in the 1840s, many states also adopted extensive abortion restrictions. James C. Mohr, *Abortion in America* 147-170 (1978). Some of these restrictions imposed penalties on "[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage]." Conn. Gen. Stat., tit. 12, ch. 2, § 25 (1866).[20] Other then-illegal products or activities that could not be advertised included prize fights,[21] and obscene books.[22] Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising. *See* W. Va. Code, ch. 149, § 11 (1868); N.Y. Rev. Stat., pt. 4, ch. I, tit. 6, § 77 (1875); Compiled Laws of Kan, ch. 31, § 342 (1885).

Despite the absence of legislation barring false and misleading advertising of lawful products and services, as advertising increased, so too did the recognition that, if false, it could cause harm. Thus, beginning around 1864, certain more successful newspapers refused to accept ads for questionable patent medicines and quacks. Wood, *supra*, at 181. Indeed, many papers warned their readers against these disreputable advertisers. And in 1872, the national government enacted regulations aimed at restricting the dissemination of fraudulent ads through the mail.[23]

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[20] *See also* Cal. Penal Code § 317 (1872); Digest of Laws of Fla., ch. 59, § 10 (1881); Compiled Laws of Kan., ch. 31, § 342 (1885); Md. Laws, ch. 179, § 2 (1868); Mass. Gen. Stat. ch. 165, § 10 (1860); N.J. Rev. Stat., Crimes § 44 (1874); N.Y. Rev. Stat. pt. 4, ch. I, tit. 6, § 78 (1875); Ohio Rev. Stat., ch. 2732, § 1 (1860 & Supp.); R.I. Gen. Stat., ch. 232, § 23 (1872); Compiled Laws of Terr. of Utah, Penal Code, tit. 9, ch. 8, § 162 (1876). Notably, these restrictions on abortion advertising applied with equal force to all speech regarding abortion, commercial or non-commercial.

[21] Compiled Laws of Kan., ch. 31, § 338 (1885).

[22] Cal. Penal Code § 311(4) (1872); Compiled Laws of Terr. of Utah, Penal Code, tit. 9, ch. 8, § 162 (1876).

[23] *See* Act of June 8, 1872, ch. 335, 17 Stat. 283 (codified at 39 U.S.C. § 3005 (1994)) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined to have fraudulently obtained money or property via mail).



To the extent that this Court addressed issues relating to advertising during and immediately after Reconstruction, its decisions were consistent with the view that advertising should be accorded the same protection as other forms of speech. To illustrate, in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court held that Congress's 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion primarily dealt with Congress's power over the postal system, stating that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." 96 U.S. at 732. But this Court treated lottery advertisements in the same way that it treated material that today would be fully protected by the Constitution.

## III. LOWER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DISENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS.

### A. The Pervasiveness of Advertising Grew in the Early Twentieth Century.

Advertising experienced unprecedented growth and prestige in the early twentieth century.[24] By 1898, a survey by the *Press and Printer* of Boston counted 2,583 companies that advertised in regular periodicals of general

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[24] The 1904 St. Louis World's Fair recognized the growth of the industry and staged "Ad-Men's Day" with a meeting grandly named "The International Advertising Association." George French, *20th Century Advertising* 119 (1926). Professionalization of advertising continued with the creation of the Advertising Federation of America, which was formed in 1905. Wood, *supra*, at 335. Other advertising groups were formed later, including the New York Advertising League in 1906 and the American National Advertising Managers in 1910. French, *supra*, at 131, 141.

circulation. Presbrey, *supra*, at 362. Advertisements during World War I helped to sell $24 billion in war bonds to 22 million Americans and raise $400 million for the Red Cross. *Id.* at 565. One observer remarked:

> Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success.

*Id.* at 566.

As was the case after the Civil War, this widespread recognition of the power of advertising in war was not lost on manufacturers and retailers when peace returned. Total investment in advertising soared from $1.5 billion in 1918 to almost $3 billion in 1920 and continued to grow throughout the decade. Wood, *supra*, at 364-365.[25]

**B. Disenchantment With Advertising Became Apparent as a Result of Reform Movements and the Great Depression.**

As the Gilded Age gave way to the Progressive Era and the notion that civil liberties differed from economic liberties began to take hold, disenchantment with unfettered capitalism, and advertising, grew. Matthew Josephson, *The Robber Barons* 445-53 (1934); *see generally* Richard Hofstadter, *The Age of Reform* (1955). Magazines that had once accepted patent medicine advertisements—such as the *Ladies Home Journal* and *Collier's*—led the charge in 1904 and 1905 against the fraudulent claims made by the industry.[26] Wood, *supra*, at 327-30.

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[25] Part of this growth stemmed from the use of radio as a new advertising medium. Although the first radio ad did not air until 1923, by 1929 the industry received an estimated $15 million in advertising revenues for its roughly 500 broadcast stations. Presbrey, *supra*, at 578.

[26] Other targets of early reformers included billboards and other advertising perceived to be littering the landscape and testimonial advertising by celebrities that did not disclose that a fee had been paid for their endorsement. Wood, *supra*, at 347, 392-93.



Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims. *Id.* at 334. The public outcry against adulterated and dangerous foods and drugs ultimately led to the passage of the federal Food and Drug Act of 1906, which forced manufacturers to justify their claims and list product ingredients. *Id.* at 333.

Because of these and other concerns the advertising industry in 1911 pushed for a model statute barring "untrue, deceptive, or misleading" advertising. Hurnard J. Kenner, *The Fight for Truth in Advertising* 28 (1936). By 1920, thirty-seven states had adopted the Advertising Federation of America's model antifraud statute, Wood, *supra*, at 336, which largely represented a codification of long-standing common-law restrictions on false or misleading commercial messages. *See* William F. Walsh, *A History of Anglo-American Law* 328-329 (1932).

The Depression hit advertising hard in terms of both income [27] and, perhaps more importantly, in public esteem. Wood, *supra*, at 418. Critics charged that advertising was wasteful, merely adding to the consumer's cost. *Id.* at 424. Advertising was attacked because

> [t]here had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Advertising was to blame, and shrill cries arose for its annihilation.

*Id.* at 418.[28] This national mood during the Depression spurred calls for increased restrictions on advertising. The

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[27] Following the stock market crash, advertising revenues tumbled from $3.4 billion in 1929 to $1.3 billion in 1933. Wood, *supra*, at 417.

[28] Public skepticism about the role of advertising in the American economy rose significantly. The consumers' movement formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs*, *Eat, Drink and Be Wary*, and *Partners in Plunder*. *Id.* at 419-420.

federal government aggressively responded to the perceived excesses of advertising through New Deal enactments.[29]

**C. The Incorrect Association of Advertising and Economic Liberties Led to the Misguided Distinction Between Commercial and Non-commercial Speech.**

Although disenchantment among the body politic with economic liberties led to increased state regulation of the economy, this Court initially acted as a brake on that sentiment, employing the doctrine of substantive due process to strike down many state laws. Before 1919, the Court treated political speech as subject to the states' police power, power from which economic activities were relatively free. But

> the Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity . . . . [F]ree trade in ideas became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992* 100 (1996). In contrast to the First Amendment, which this Court had not treated as applicable to constrain state power, the Fourteenth Amendment's due process clause was interpreted to apply to the states.[30]

Thus, most judicial challenges during this period to restrictions on advertising relied on a substantive due process claim that the restrictions interfered with the pursuit of a lawful business rather than advancing First Amendment claims. For example, in *Halter v. Nebraska,*

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[29] Indeed, Professor Bruce Ackerman has argued that these and other changes brought about by the New Deal amounted to a decisive watershed in constitutional law. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 510-514 (1989). *See also* David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699 (1991) (defining the New Deal as one of three "First Amendment Eras").

[30] It was not until 1931 that this Court first explicitly held that the First Amendment applied to the states. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).



205 U.S. 34 (1907), this Court upheld a state law barring use of the American Flag on beer bottles. The parties failed to raise a First Amendment challenge, instead relying on a due process claim. State courts during this period also analyzed, and in many cases invalidated, challenges to advertising regulations under the rubric of substantive due process.[31]

By the time the Court decided *Valentine v. Chrestensen,* 316 U.S. 52 (1942), however, in which it first stated that advertising was outside the protection of the First Amendment, the notion of substantive due process had been rejected, and review of economic legislation reduced to "rational basis" scrutiny.[32] *Valentine*'s dismissive treatment of commercial speech seems most closely linked to the Court's rejection of economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. Thus, what has been said about the Contracts Clause may be said about

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[31] *See, e.g., Seattle v. Proctor*, 48 P.2d 238, 239 (Wash. 1935) (striking down a city statute compelling businesses to disclose "the number of such . . . [articles] and the lowest price at which each of said articles were offered for sale to the public prior to said advertisement."); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925) (holding unconstitutional a bar on advertising by dry cleaners without the fire marshal's permission to engage in business); *see also State ex rel. Booth v. Beck Jewelry Enters., Inc.*, 41 N.E.2d 622, 626 (Ind. 1942) ("Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment.") (citations omitted).

[32] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis"); *see also* Yassky, *supra*, at 1729-1730 (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's *Lochner*-style constitutionalization of rights to property and contract). *But see Needham v. Proffitt*, 41 N.E. 606, 608 (Ind. 1942) (striking down statute prohibiting funeral directors from advertising under state free speech guarantee).

the protection of commercial speech: "misinterpreted as a form of economic substantive due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded." Doug A. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings L. Q. 525, 526 (1987).

Thus, the differentiation between commercial and non-commercial speech is properly understood as an outgrowth of twentieth-century disenchantment with property rights and economic liberties, and the mislabeling of advertising as a substantive due process right rather than a First Amendment freedom. The distinction between commercial and non-commercial speech, however, is inconsistent with the text and history of the First and Fourteenth Amendments, as well as with the long-standing "traditions of the American people."

## IV. THIS PROPOSED INTERPRETATION OF THE FIRST AMENDMENT IS NOT INCONSISTENT WITH THIS COURT'S PRIOR PRECEDENT AND WILL NOT DRAMATICALLY ALTER THE FACE OF FIRST AMENDMENT JURISPRUDENCE.

Removing the distinction between commercial and non-commercial messages is consistent with most commercial speech cases this Court has decided. Indeed, in most cases, the court has found restrictions on commercial speech to be unconstitutional. *See, e.g., 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a federal law barring brewers from displaying alcoholic content of their beers on the products' labels); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down a restriction preventing Florida CPAs from making uninvited in-person visits or telephone calls to potential clients); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (striking down a ban prohibiting newsracks used to distribute commercial handbills on public property). This analysis would also have the impact of avoiding the anomalous results that the *Central Hudson* test occasionally allows. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).



The proposed interpretation would not, however, prevent government regulation of false and misleading advertising. As shown, the First Amendment has always been understood to allow regulation of such speech. This view is consistent with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where this Court granted First Amendment protection to commercial speech but held that the government had the power to ensure that commercial messages were not false or misleading. 425 U.S. at 771-72 n.24. Similarly, the government would not be prohibited from restricting advertising of illegal products and services.[33] Thus, affording commercial speech full protection is consistent with the traditional understanding of the First Amendment and is not contrary to the established precedents of this Court.

## V. THE FEDERAL BAN ON BROADCAST ADVERTISING OF CASINO GAMBLING IS PROHIBITED BY THE FIRST AMENDMENT.

Assessed under the level of scrutiny accorded fully protected speech, this becomes an easy case.[34] First, the gov-

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[33] Products and services that could not be advertised in the colonial and Reconstruction eras were prohibited in their entirety (e.g., horse-racing and lotteries). Such activities, when lawful, could be advertised. There is also no basis for relying on such statutes to uphold advertising restrictions on products that may lawfully be marketed to the overwhelming majority of the population. *See Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) (protection of commercial speech "would disappear if its protection ceased whenever the advertised product might be used illegally").

[34] As the Petitioners' brief conclusively demonstrates, however, assessed under the *Central Hudson* analysis, the broadcast ban is unconstitutional. *See* Petitioners' Brief. Certainly, if the regulation were invalid under this lower level of scrutiny, it would fail under the more searching review required for fully protected speech.

ernment cannot support its claim that curbing gambling is a compelling governmental interest when such activity is not illegal. Moreover, this regulation is not sufficiently narrowly tailored to serve the government's interest: the very fact that the government allows advertising of casino gambling through other media implicates the effectiveness of a ban on the broadcasting of casino gambling ads. Similarly, the Fifth Circuit argument about the "powerful sensory appeal of gambling conveyed by television and radio," *Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334, 340 (5th Cir. 1998), fails in light of the exceptions to the broadcast ban which allow advertising of other forms of gambling. 18 U.S.C. § 1307.

## CONCLUSION

For the reasons set forth herein, the Court should reverse the Fifth Circuit's decision. In the process, the Court should make clear that truthful commercial speech about lawful products, services and activities should be accorded the same level of constitutional protection as non-commercial speech.

Respectfully submitted,

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February 25, 1999

(8)

No. 98-387



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,

*Petitioners,*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST[1]

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 7,500 subsidiaries, divisions and operating units, ANA's members market a wide array of goods and services, and account for a significant percentage of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, ANA has long been committed to strong First Amendment protection for truthful, nonmisleading commercial speech. That commitment has been demonstrated by ANA's frequent appearance as an amicus curiae in commercial speech cases before this Court and the federal circuit courts.

This case is of particular importance to ANA's members because it presents an opportunity to clarify the standard of judicial review for governmental restrictions on truthful, nonmisleading commercial speech. At the same time that some Justices of this Court are expressing the view that a form of strict scrutiny should apply to such restrictions, certain lower courts, including the court of appeals here, are applying a retrograde test that more closely approximates rational basis scrutiny. Until this

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

confusion is eliminated, ANA's members will not receive adequate and consistent First Amendment protection for their advertising.

Moreover, ANA believes that the right way to eliminate the confusion in the lower courts is by this Court's explicit adoption of strict scrutiny as the test for reviewing content-based restrictions on truthful, nonmisleading commercial speech. In addition to the legal arguments made in this brief, ANA urges the Court to consider another reason for the adoption of strict scrutiny – the dignity interest of the millions of Americans who earn their living through commerce. Protection of this interest is a fundamental reason why we have a Bill of Rights. Commerce is a dignified human endeavor, no less than the pursuit of art, science or politics. ANA's members and their employees are rightly proud of the products and services they offer to the public, and the contribution they make to the prosperity of our nation. Government should not be allowed to prevent them from speaking truthfully through advertising about the activities which sustain their livelihood, unless government can satisfy the exacting requirements of strict scrutiny.

## SUMMARY OF ARGUMENT

More than two decades ago, this Court recognized the great constitutional value of truthful, nonmisleading commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Since then, the Court has been clarifying the substantial burden of proof that a government must satisfy if



it chooses to restrict commercial speech. The Court's efforts have focused on the balancing test adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) – a test that, as some Justices have observed, was inadequate from the beginning because it assumed that truthful, nonmisleading commercial speech should receive less than full First Amendment protection. Perhaps in reaction, the Court has refined and enhanced that test, in the evident faith that it could grow to provide adequate and consistent protection for commercial speech rights. Indeed, as discussed in this Court's more recent decisions, the *Central Hudson* test has become nearly equivalent to strict scrutiny.

Unfortunately, some lower courts have ignored this Court's more recent decisions, choosing instead to adhere to its earlier, implicitly superseded decisions, or their own mistaken notions about the "lesser" value of commercial speech. The Court now has before it yet another case where government has attempted to keep the American people ignorant for their own purported good, and a court of appeals, claiming to apply *Central Hudson*, has upheld such censorship as permissible under the First Amendment. This deeply flawed ruling reinforces the view of several Justices of this Court – an apparent majority – that *Central Hudson* is not up to the task of ensuring consistent First Amendment protection for commercial speech rights.

The *Central Hudson* test should be replaced explicitly by a test that applies strict scrutiny to content-based restrictions on truthful, nonmisleading commercial

speech. The dangers associated with content discrimination, which justify full First Amendment protection for noncommercial speech, apply with equal force to commercial speech. Against the backdrop of the arguments the Government can be expected to offer in its effort to defend the indefensible positions taken by the court below, this Court will have an opportunity to review and renounce the rationale for "limited" protection – the notion that commercial speech deserves reduced constitutional protection because of its supposed "verifiability" and "hardiness." Further, the original intent behind the First Amendment supports adoption of strict scrutiny, because eighteenth century Americans undoubtedly would have rejected the suggestion that the First Amendment to the Constitution they adopted distinguishes between what we latter-day Americans have chosen to classify as commercial and noncommercial speech.

The time has come for the Court to complete the journey that it started with *Virginia State Board* in 1976. In its cases preceding this one, the Court has moved ever closer to adopting strict scrutiny protection for commercial speech. We respectfully submit that, in reversing the court of appeals, the Court should announce that full First Amendment protection for truthful, nonmisleading commercial speech has arrived.



## ARGUMENT

### I. THE LOWER COURTS TOO OFTEN RENDER DECISIONS THAT UNDERVALUE COMMERCIAL SPEECH RIGHTS, DESPITE TWENTY-TWO YEARS OF EFFORTS BY THIS COURT TO DEFINE AND ENHANCE CONSTITUTIONAL PROTECTION FOR THOSE RIGHTS

#### A. This Court Steadily Has Been Raising the Level of First Amendment Protection for Commercial Speech

During the past twenty-two years, this Court has taken commercial speech law from a point where such speech received no First Amendment protection, to the point today where the Court appears to be on the verge of adopting a standard of strict scrutiny. For several decades, the law of commercial speech could be summed up in one sentence from *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942): "We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." That unsupported holding, which Justice Douglas later characterized as "casual, almost offhand," was overruled 34 years later when the Court more carefully considered the value of commercial speech in *Virginia State Board*. *See Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

Before tracing the evolution of the constitutional standard for protecting commercial speech, it is worthwhile to explore the reasons for the Court's recognition in *Virginia State Board* that the First Amendment protects commercial speech. The power of those reasons has driven commercial speech protection ever closer to strict

scrutiny. Not surprisingly, the Court's reasons for protecting commercial speech are virtually identical to its reasons for protecting political and other noncommercial speech:

> There is, of course, an alternative to this highly paternalistic approach [of allowing a government to keep its citizens in ignorance]. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

425 U.S. at 770.

Extending the parallel to noncommercial speech, the Court in *Virginia State Board* explained that First Amendment protection for commercial speech is premised on the rights of both hearers and speakers (such as the members of ANA). From the perspective of hearers, the Court observed that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. As to speakers, four Justices recently noted that their interests also were at the heart of *Virginia State Board*: "[w]hat stood against the claim of social unimportance for commercial speech was not only the consumer's interest in receiving information, but the commercial speaker's own economic interest in promoting his wares. '[W]e may assume that the advertiser's



interest is purely an economic one. That hardly disqualifies him from protection under the First Amendment.' " *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2143 (1997) (Souter, J., dissenting, joined by Rehnquist, C.J., Scalia & Thomas, JJ.) (*quoting Virginia State Bd.*, 425 U.S. at 762).

Just as the Court's reasons for protecting commercial speech sound like its reasons for protecting noncommercial speech, so too has its *Central Hudson* test for protecting commercial speech increasingly come to resemble the strict scrutiny test applicable to restrictions on noncommercial speech. Consider the third prong of *Central Hudson*. In 1986, it appeared that the Court had diluted that prong, requiring government only to show that it had a "reasonable belief" that its restriction on speech would directly advance its asserted interest. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986). But by 1993, the Court had revived and reinvigorated the third prong, a process that culminated in *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Under the *Edenfield* standard, the Court requires a government to "*demonstrate* that the harms it recites are *real* and that its restriction will *in fact* alleviate them to a *material* degree." *Id.* at 771 (emphasis supplied). This enhanced third prong is essentially indistinguishable from the strict scrutiny test's requirement that government demonstrate a "substantial relationship" between a challenged restriction on fully protected speech and the asserted governmental goal. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-39 (1980).

This Court similarly strengthened the fourth prong of *Central Hudson* in the 1990's. Again, it had appeared that

*Posadas* had drained that prong of much of its power, by concluding that it is "up to the legislature" to decide whether or not a less speech-restrictive alternative would be as effective as censorship. 478 U.S. at 344. In 1993, however, the Court revitalized the fourth prong, stating that it is not met if there are "obvious less-burdensome alternatives to the restriction on commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). This clarification of the fourth prong has become an independent ground under which restrictions on commercial speech are invalidated. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528-29 (1996) (O'Connor, J., concurring); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489-91 (1995). As Justice Thomas has commented, the augmentation of the fourth prong brings it very close to the "least restrictive means" test applicable in the context of fully protected speech. *44 Liquormart*, 517 U.S. at 524-25.

In sum, this Court's decisions in the 1990's have elevated First Amendment protection for commercial speech, transforming the third and fourth prongs of *Central Hudson* into requirements that closely approximate strict scrutiny.[2] As discussed below, however, too many lower courts have not learned from this Court's more

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[2] This Court has yet to deal with a key remaining distinction between the *Central Hudson* test and strict scrutiny. Whereas *Central Hudson*'s second prong requires the government to demonstrate a "substantial" interest in restricting commercial speech, strict scrutiny requires a "compelling" interest. As discussed below, there is no basis for imposing a lesser burden on government when it restricts truthful, nonmisleading commercial speech based on content.



recent decisions, and instead apply *Central Hudson* as if it were a balancing test that permits judicial deference to governmental censorship.

### B. The *Central Hudson* Test, Even as Enhanced, Does Not Provide Consistent Protection for First Amendment Rights

Regardless of how the *Central Hudson* test has been defined, it inevitably has been difficult to apply in practice. Justice Thomas has described the unpredictable malleability of *Central Hudson* when applied by judges:

> The courts, including this Court, have found the *Central Hudson* "test" to be, as a general matter, very difficult to apply with any uniformity. This may result in part from the inherently nondeterminative nature of a case-by-case balancing "test" unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test.

517 U.S. at 526-27 (footnotes omitted).

But inconsistent results in constitutional litigation violate our fundamental sense of justice. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). The protection of civil rights must not depend upon a spin of the judicial assignment wheel. *See id.* Justice Scalia has crafted an analogy that illuminates this principle of equal treatment under the law, and which is apropos in a case involving broadcast advertising: "try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed." *Id.*

To extend Justice Scalia's analogy about inconsistent treatment, it is plainly unjust that, under current case law, Americans in certain parts of the nation can watch and listen to broadcast advertising for non-Indian casino gaming, while their brethren in other parts of the nation cannot. This unequal treatment of First Amendment rights stems from and is emblematic of the problems with the *Central Hudson* test. Three lower courts, all purporting to apply *Central Hudson*, reached irreconcilable decisions when considering identical First Amendment challenges to section 1304's restrictions on broadcast advertising. *See Greater New Orleans Broadcasting Ass'n v. United States*, 69 F.3d 1296 (5th Cir. 1995), *vacated*, 117 S. Ct. 39 (1996), *on remand*, 149 F.3d 334 (5th Cir. 1998), *cert. granted*, 1999 WL 13527 (Jan. 15, 1999); *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 188 S. Ct. 1050 (1998); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997), *cert. denied*, 1999 WL 8447 (U.S. Jan. 11, 1999).

In this case, the Fifth Circuit majority found that the Government satisfied the third prong of *Central Hudson* – even though the Government had submitted no evidence to show that its ban on broadcast advertising is effective in achieving its goals – and the fourth prong – even though the Government had submitted no evidence to show why it has not adopted any of the available non-advertising-related means of discouraging casino gaming.

In stark contrast, the Ninth Circuit in *Valley Broadcasting*, considering a record that was virtually identical to the record before the Fifth Circuit, concluded that the Government did not and could not meet the requirements of the third prong. Similarly, the district court in *Players*



*International*, after closely reviewing the Government's evidence, held that the Government had failed to satisfy both the third and fourth prongs of *Central Hudson*.

Putting aside for the moment the issue of which court reached the correct holding, these conflicting decisions make plain that the *Central Hudson* test is not doing what any constitutional standard must do – promote consistent protection of civil rights. Moreover, these three decisions epitomize a much larger problem in the lower courts.

Today, the *Central Hudson* test means very different things in different courtrooms. Some judges adhere to this Court's more recent rulings, which have made *Central Hudson* akin to a strict scrutiny test. *See, e.g., Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 99-101 (2d Cir. 1998); *Nordyke v. Santa Clara Cty.*, 110 F.3d 707, 713 (9th Cir. 1997). Other judges, such as the two in the majority here, rely on this Court's earlier decisions, which seemed to define *Central Hudson* as a test that permitted judicial deference to governmental censors.[3] *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated*, 517 U.S. 1206, *on remand*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

The problem of inconsistent commercial speech decisions is unlikely to be fixed by reiterating or further tinkering with the *Central Hudson* test. This Court has

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[3] Those earlier decisions, although implicitly superseded, have yet to be explicitly overruled by this Court, with one exception. In *44 Liquormart*, the Court started its housecleaning in this area by overruling much of *Posadas*. *See* 517 U.S. at 509-10 (principal opinion); *id.* at 531-32 (O'Connor, J., concurring).

accepted an extraordinary number of commercial speech cases for full review since *Central Hudson* was decided in 1980 – 18 separate cases in approximately 18 years. The time has come to acknowledge that the *Central Hudson* test cannot be salvaged.

A rising chorus of lower courts is calling upon this Court to bring clarity to commercial speech law. In this case, Judge Jones writes for the majority, "the Supreme Court's [commercial speech] jurisprudence has become as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned." *Greater New Orleans Broadcasting Ass'n*, 149 F.3d at 335. The dissenter, Judge Politz, concurs on this one point: "The failure of the Justices to reach an agreement in *44 Liquormart* about the specifics of the parameters of the constitutional review to be applied to commercial speech restrictions deprives the lower courts of the guidance a coherent, dispositive framework would have provided for evaluating these claims." *Id.* at 341.

Similar pleas for clarity are coming out of the Ninth Circuit. In *Nordyke*, a unanimous panel declares, "the *Central Hudson* test is not easy to apply and the [Supreme Court's] cases summarized above might suggest it is sufficiently flexible to accommodate 'good' commercial speech and to suppress that which is 'not so good.' " 110 F.3d at 712. In *Valley Broadcasting*, another Ninth Circuit panel unanimously states, "*44 Liquormart* fails to present a coherent framework for reviewing [commercial speech] claims." 107 F.3d at 1334.

Fortunately, this Court appears ready to respond to these requests for clarity. We respectfully submit that in



the Court's most recent commercial speech decision, *44 Liquormart*, the opinions show that a majority of five Justices now recognizes that the *Central Hudson* test does not sufficiently protect constitutional rights. *See* 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 517-18 (Scalia, J., concurring) (expressing his "discomfort with the *Central Hudson* test," and that he is not "disposed to reinforce" it); *id.* at 528 (Thomas, J., concurring).[4] Moreover, the four other Justices in *44 Liquormart*, while still relying on *Central Hudson*, acknowledge that an issue has emerged as to "whether the test we have employed since *Central Hudson* should be displaced." *Id.* at 532 (O'Connor, J., concurring). As discussed below, adoption of strict scrutiny would not only eliminate the inconsistent results and other failings of the *Central Hudson* test, but also would provide commercial speakers and their audiences with the constitutional protection they deserve.

## II. THIS COURT SHOULD ADOPT STRICT SCRUTINY AS THE APPROPRIATE STANDARD FOR JUDICIAL REVIEW OF CONTENT-BASED RESTRICTIONS ON TRUTHFUL, NONMISLEADING COMMERCIAL SPEECH

### A. Content Discrimination Is Equally Unacceptable for Commercial and Noncommercial Speech

The unacceptability of content control by government, which justifies strict scrutiny in the context of

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[4] *See also Rubin*, 514 U.S. at 493 (Stevens, J., concurring) (discussing the "misguided approach adopted in *Central Hudson*").

noncommercial speech, applies with equal force in the context of commercial speech. The First Amendment serves a fundamental national interest by treating content-based restrictions on speech as anathema:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, a d wide-open."

*Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (citation omitted). When government discriminates on the basis of content, the dangers are a majoritarian suppression of disfavored or less popular ideas and a resulting distortion of the national debate through which, the First Amendment assumes, the best ideas (including the best products and services) will prevail. *See Virginia State Bd.*, 425 U.S. at 770.

In the commercial speech area, content discrimination not only hinders discussion about the relative merits of various products and services, but also about whether and to what extent the underlying economic activities should be regulated. *44 Liquormart*, 517 U.S. at 503 (principal opinion). For example, the nation is currently debating the impact of increased gambling and possible regulatory responses. Indeed, a National Gambling Impact Study Commission has been impaneled and is scheduled to issue its report this June. *National Gambling*



*Impact Study Comm'n*, Pub. L. 104-169, 110 Stat. 1482 (1996), *as amended by* Pub. L. 105-30, § 1, 111 Stat. 248 (1997). Particularly at this time, the Government should not be allowed to enforce section 1304, which restricts the flow of information that otherwise would both stimulate and inform this important national debate. *See id.*; *Virginia State Bd.*, 425 U.S. at 780 & n.8 (Stewart, J., concurring).

The courts should be equally vigilant with respect to content discrimination in the noncommercial and commercial speech contexts, for commercial speakers frequently communicate with the public about new ideas that are at least as important as many of the ideas contained in noncommercial speech.[5] *See Virginia State Bd.*, 425 U.S. at 763. For example, advertising for computers and related products tells the American public about ways to receive unprecedented access to information and how to form electronic communities; advertising for digital cameras informs families of new ways to preserve their memories of important events; and advertising for automobiles communicates innovations that reduce the risk of injury from accidents. These messages cannot be less worthy of protection than the expletive about the

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[5] This Court's antipathy toward content discrimination in the commercial speech context is reflected in its "general rule" that "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U.S. at 767. Moreover, the Court has recognized that the protected content of advertising includes not only explicitly factual material, but also images designed solely to "attract[ ] the attention of the audience to the advertiser's message." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

draft emblazoned on Leonard Cohen's jacket, or the rantings of neo-Nazis. *See Cohen v. California*, 403 U.S. 15 (1971); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

Indeed, this Court previously has recognized that content discrimination is no less pernicious simply because the restricted speech falls into a category that traditionally has not received full First Amendment protection. In *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), the Court held that strict scrutiny must apply when a government restricts the content of speech for reasons other than those that make a particular category of speech proscribable, rather than fully protected. *Id.* at 387-88. The Court applied strict scrutiny in *R.A.V.* because defendant City of St. Paul had restricted "fighting words" not because of the likelihood of a violent response, but in order to impose special prohibitions on "those speakers who express[ed] views on disfavored subjects." *Id.* at 391. More to the point, the Court added that this same First Amendment principle would mean that strict scrutiny should apply whenever a government restricts the content of commercial speech for reasons other than those that justify depriving it of full First Amendment protection, such as the risk of fraud. *Id.* at 388-89 (citations omitted).[6]

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[6] Several lower courts, relying on *R.A.V.*, have either applied or considered the application of strict scrutiny to content-based restrictions on commercial speech. *See MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (recognizing potential application of *R.A.V.* in commercial speech context); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and



*R.A.V.* was invoked in spirit if not in name when Justice Stevens, writing in *44 Liquormart* and joined by Justices Kennedy and Ginsburg, endorsed application of strict scrutiny to content-based restrictions on commercial speech: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process [*i.e.*, prevention of overreaching or deception], there is far less reason to depart from the rigorous review that the First Amendment generally demands." 517 U.S. at 501.[7]

As the foregoing discussion demonstrates, the dangers of content discrimination require that strict scrutiny

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*R.A.V.* without deciding which is required); *Citizens United For Free Speech II v. Long Beach Township Bd. of Comm'rs*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in [*R.A.V.*], that commercial speech must be protected by the usual strictures against content-based distinctions.").

[7] Certain courts, including the court of appeals here, have tried to diminish the endorsement of strict scrutiny by Justices Stevens, Kennedy and Ginsburg by claiming that it only applies to blanket bans on commercial speech. Justice Stevens' opinion does note the particular danger of complete speech bans, but never suggests that a less than complete ban should be excused from the rigors of strict scrutiny. Indeed, Justice Stevens cited the unanimous decision in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), a decision where the Court rejected the argument that a content-based ban on "For Sale" signs should receive less First Amendment scrutiny because it affected only one mode of communication. *Id.* at 93-94; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

be applied to restrictions on truthful, nonmisleading commercial speech. Nonetheless, advocates of censorship insist that strict scrutiny should be reserved only for noncommercial speech. Typically, they premise their argument on two supposed distinctions between commercial and noncommercial speech – the greater "verifiability" and "hardiness" of commercial speech.

The possibility that these distinctions might exist, and that they might justify less protection for commercial speech, was initially suggested by Justice Blackmun in a footnote in *Virginia State Board*, 425 U.S. at 771 n.24. In fact, it was the positing of these so-called "commonsense distinctions" that convinced this Court to create the *Central Hudson* test and provide less than full First Amendment protection to commercial speech. *See Central Hudson*, 447 U.S. at 562-63.

We respectfully submit that, regardless of what "common sense" once seemed to suggest, these distinctions can no longer, under careful consideration, support a regime of lesser protection for commercial speech. As Justice Stevens, joined by Justices Kennedy and Ginsburg, states in *44 Liquormart*, "neither the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference." 517 U.S. at 502. The same conclusion was reached by Justice Thomas. *Id.* at 523 n.4. Even Justice Blackmun, who first posed these so-called "commonsense differences," later explained that they do not "justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech." *Central Hudson*, 447 U.S. at 578.



A leading article on this subject has examined the "hardiness" and "verifiability" arguments, concluding "that the commercial/noncommercial distinction makes no sense." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990). When first describing the "hardiness" distinction, Justice Blackmun suggested that "[s]ince advertising is the [s]ine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Virginia State Bd.*, 425 U.S. at 771 n.24. Kozinski and Banner, however, point out that much noncommercial speech is engaged in for profit but nonetheless receives full First Amendment protection, such as newspaper publishing and news broadcasting. Moreover, the profit motive does not necessarily make commercial speech any hardier than fully protected speech. Other motivations for speaking can be just as strong as economics, such as religious feeling, political enthusiasm, or artistic impulses. 76 Va. L. Rev. at 637.

The "verifiability" distinction fares no better under Kozinski and Banner's examination. They observe that many varieties of noncommercial speech, such as scientific speech, are at least as objective as commercial speech, and yet receive full First Amendment protection. *Id.* at 635. Moreover, the supposed greater verifiability of commercial speech cannot justify reduced constitutional protection when government seeks, as it does here, to censor for reasons having nothing to do with the truth or falsity of commercial speech, or its potential to mislead.

*Id.*; *see 44 Liquormart*, 517 U.S. at 501 (Stevens, J.); *R.A.V.*, 505 U.S. at 387-88.[8]

In short, the evils of content discrimination, as recognized by this Court in *R.A.V.* and other precedents throughout decades of First Amendment analysis, require that truthful, nonmisleading commercial speech be accorded the same full First Amendment protection as noncommercial speech.

### B. The Historical Circumstances Surrounding the Adoption of the Bill of Rights Confirm that Commercial Speech Merits Full First Amendment Protection

The historical evidence of original intent also supports equal First Amendment treatment of commercial and noncommercial speech.[9] As Justice Scalia has explained, a proper search for original intent "requires

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[8] ANA is not asking this Court to go beyond the holding in *R.A.V.* by extending strict scrutiny protection to commercial speech that is either false or misleading. False advertising harms ANA's members as much as it harms consumers. In any event, there is no dispute that the advertising banned by section 1304 is entirely truthful. Consequently, the "very different constitutional questions" raised by false or misleading speech should be left "for another day." *Linmark Assocs.*, 431 U.S. at 98. (ANA also is not asking this Court to extend First Amendment protection to advertising for unlawful products or services.)

[9] This brief does not repeat the historical evidence already submitted to the Court in *44 Liquormart*, and regarded by certain Justices as supportive of full First Amendment protection for commercial speech. 517 U.S. at 517 (Scalia, J., concurring); *id.* at 522 (Thomas, J., concurring).



immersing oneself in the political and intellectual atmosphere of the time – somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856-57 (1989).

During the period leading up to the Constitutional Convention, Americans were deeply concerned about the relationship between government and commerce. The Articles of Confederation had not sufficiently advanced, and at times actively hindered, commerce between the States. *See* Max Farrand, *The Framing of the Constitution of the United States* 7 (1913). As explained by the historian Robert Middlekauff,

> [B]y 1786 a feeling of crisis pervaded Congress and much of the nation. At the center of this feeling lay a disenchantment with public finance and commercial policy which in turn bred doubts about the adequacy of republican institutions of government.

Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* 591 (1982).[10] This commercial crisis in

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[10] Indeed, commercial concerns were the impetus for the Annapolis Conference, the immediate precursor to the Constitutional Convention. Christopher Collier & James Lincoln Collier, *Decision in Philadelphia: The Constitutional Convention of 1787* 42-43 (1986). During September 1786, Commissioners from five states gathered in Annapolis to discuss trade. The Commissioners had been authorized by their respective States "to meet such Commissioners as were, or might be, appointed by the other States in the Union, at such time and place, as

the young nation was a fundamental reason for the convening of the Constitutional Convention in 1787. *See* Farrand, *supra*, at 11.

The Federalist papers, which were published following the adjournment of the Constitutional Convention, could not have been more clear about the centrality of commercial concerns to the Framers. As Alexander Hamilton wrote in No. 12, "The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares." *The Federalist No. 12*, at 91 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In order to remedy the commercial crisis that had arisen under the Articles of Confederation, the drafters of the Constitution provided for a strong central government that would have the express power to regulate interstate commerce. *See* Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* 9-10 (1966).

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should be agreed upon by the said Commissioners to take into consideration the trade and Commerce of the United States, to consider how far an uniform system in the commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to their several States, such an Act, relative to this great object, as when unanimously ratified by them would enable the United States in Congress assembled effectually to provide for the same." *Proceedings of the State Commissioners at Annapolis, Maryland, September 11-14, 1786, in The Origins of the American Constitution: A Documentary History* 20 (Michael Kammen ed., 1986).



Of course, the creation of a strong central government also worried many Americans. They feared that the new federal government would trample upon their rights. To allay those fears, the Bill of Rights was drafted and ratified by the States. *The Reader's Companion to American History* 97-99 (Eric Foner & John A. Garraty eds., 1991); Herbert J. Storing, *What the Anti-Federalists Were For* 64-70 (Murray Dry ed., 1981). First among the amendments to the Constitution was the unequivocal provision that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

The issue now before this Court is whether the American people of that era, if asked, would have understood the First Amendment as protecting advertising equally with political, religious or literary expression. Because a desire for prosperity based on commerce was a prime force leading to the creation of the Constitution, it must be presumed that the Americans of that day did have that understanding. That presumption is buttressed by considering perhaps the best historical evidence of how contemporary Americans would have perceived advertising – the newspapers of the day.

Attached as appendices hereto are pages from newspapers published during the years leading up to the Bill of Rights in three of the nation's largest cities, Boston, New York and Philadelphia. These pages show that advertising was presented as another "news" item, albeit news about commercial matters, such as a change in the ownership of a tavern or the arrival of a shipment of goods in the "last vessels" from London.

Excerpted from the Philadelphia and Boston newspapers are examples of their front pages, which lead off with banners declaring the right to freedom of speech and press. Directly below those declarations appear columns containing advertisements. The advertisements are largely indistinguishable in appearance from the legal announcements, opinion pieces and political reports that appear on the same page. Indeed, the standard phraseology of the advertisements underscores their informational function: typically, the advertiser states that he "informs his friends and the public in general" of the availability of various products or services for sale.

The excerpt from the New York newspaper is particularly telling, as it is from the edition in which the newly adopted federal Constitution was published. On that same page, in addition to some advertising, appears the following apology:

> *A number of* ADVERTISEMENTS, PIECES, *and* PARAGRAPHS, *are omitted, this week, to give place to the* FEDERAL CONSTITUTION. – *It is presumed, that the cause of these omissions will operate as a sufficient apology to all interested therein.*

Clearly, advertisements were so important at the time that the publisher felt compelled to apologize for their omission, even when it was occasioned by the publication of the most newsworthy document of the century.

The search for original intent often requires a degree of imagination. After piecing together what is known about the time in question, the searcher must imagine how people then living would answer a particular question. At the time of the ratification of the Bill of Rights,



the American people were focused on advancing the free flow of commerce, relied heavily on advertising as a means of communicating about commercial matters, and were interested in placing limits on the powers given to the national government by the new Constitution. It is difficult to conceive that these early Americans, if asked, would have accepted the proposition that their advertising was less worthy of protection under the First Amendment than their speech on other important issues of the day. Indeed, this valuing of commercial speech by eighteenth century Americans lives on in their late twentieth century descendants, whose "interest in the free flow of commercial information . . . may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate." *Virginia State Bd.*, 425 U.S. at 763.

In sum, both the historical evidence of original intent, and this Court's repeated condemnation of content discrimination, compel the adoption of strict scrutiny as the test for protecting truthful, nonmisleading commercial speech from paternalistic censorship. Adoption of strict scrutiny in that context already has been endorsed by four members of this Court – Justices Stevens, Kennedy, Thomas and Ginsburg.[11] *44 Liquormart*, 517 U.S. at 501 (principal opinion); *id.* at 526 (Thomas, J., concurring). Indeed, as discussed above, the *Central Hudson* test, under this Court's more recent decisions, no longer is an

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[11] Strict scrutiny protection for commercial speech is not a new idea in this Court, having been endorsed earlier by Justices Brennan and Blackmun. *Posadas*, 478 U.S. at 351 (Brennan, J., dissenting); *Discovery Network*, 507 U.S. at 438 (Blackmun, J., concurring).

intermediate scrutiny test, but has evolved into a near equivalent of strict scrutiny. The Court should use this case to explicitly place truthful commercial speech where it has always belonged – in the pantheon of speech fully protected by the First Amendment.[12]

## III. THE DECISION BELOW SHOULD BE REVERSED UNDER EITHER STRICT SCRUTINY OR A PROPERLY APPLIED *CENTRAL HUDSON* TEST

Section 1304's ban on broadcast advertising for non-Indian casino gaming cannot withstand either strict scrutiny or the corresponding requirements of the enhanced *Central Hudson* test.[13] First, the Government cannot show that it has even a legitimate interest that supports its broadcast ban, let alone the "substantial" interest required by *Central Hudson*, or the "compelling" interest required by strict scrutiny. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The Government's assertion that it has a substantial interest in reducing gambling cannot be squared with its inconsistent, and

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[12] *See* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, & Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 126 (1996) ("After *Liquormart*, it is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles.").

[13] As a threshold matter, under strict scrutiny, a content-based restriction on speech is presumptively invalid. *R.A.V.*, 505 U.S. at 382. Four Justices of this Court appear to believe that the same presumption of invalidity should apply to content-based restrictions on truthful, nonmisleading commercial speech. *44 Liquormart*, 517 U.S. at 503 (principal opinion); *id.* at 518 (Thomas, J., concurring).



thus irrational, treatment of various forms of gambling. In contrast to its attempt to reduce non-Indian casino gaming, the Government previously has told this Court that it maintains a neutral position with respect to state lotteries, and so permits broadcast advertising for lotteries that originates in states where lotteries are legal. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993). Even more inconsistently, Congress exempted Indian casino gaming from section 1304's broadcast ban, an exemption that completely undercuts the Government's assertion that it has a substantial interest in reducing gambling. Surely, there can be no legitimate distinction between the harms allegedly caused by gambling based on the heritage of the person who owns the roulette wheel.

Second, the Government also cannot satisfy its burden of demonstrating the effectiveness of its speech ban in achieving its asserted goal. This requirement appears both under the strict scrutiny test and the third prong of *Central Hudson*. *See Village of Schaumburg*, 444 U.S. at 638-39. In the trial court, the Government quite deliberately chose not to submit any evidence to demonstrate that advertising in general directly causes people to gamble. Nor did it submit any evidence to show that a ban limited to broadcast advertising of non-Indian casino gaming, while leaving untouched numerous other forms of gambling advertising (including broadcast advertising for Indian casinos), could materially reduce gambling. Instead, both the Government and the court of appeals relied on mistaken, and, in any event, inadequate presumptions about the effects of advertising. *See Glickman*, 117 S. Ct. at 2153 (Souter, J., dissenting) (noting that "the

unremarkable presumption that advertising actually works to increase consumer demand" is not "automatically convertible" into support for the more tenuous connection between the elimination of *some* advertising and a reduction in demand).

Moreover, the numerous exceptions to section 1304's broadcast advertising ban – for gambling activities ranging from lotteries run by 37 States to Indian casino gaming in at least 22 States – make it impossible for the Government to prove that section 1304 materially reduces gambling. Dispositive here is this Court's decision in *Rubin*, 514 U.S. 488-89, which invalidated the Government's prohibition on the disclosure of alcohol content on beer labels, as "irrational" because the Government inconsistently permitted the disclosure of alcohol content both on labels of distilled spirits and in advertising for beer or distilled spirits. *See Valley Broadcasting*, 107 F.3d at 1334-35; *Players Int'l*, 988 F. Supp. at 506 n.5.

Third, the Government cannot show that it has used the "least restrictive means" to advance its goal, or, to put the requirement in *Central Hudson* terms, that it has carefully considered obvious, less burdensome alternatives to censorship. *See 44 Liquormart*, 517 U.S. at 506-08 (Stevens, J.); *id.* at 524-26 (Thomas, J., concurring); *id.* at 528-31 (O'Connor, J., concurring). Here, plaintiffs identified 16 non-speech-related alternatives for reducing gambling, and the Government submitted absolutely no evidence to show why it had rejected those alternatives. For this additional reason, section 1304 should be struck down as an impermissible restriction on speech. *See Players Int'l*, 988 F. Supp. at 505-07.



The court of appeals disregarded its constitutional duty in this case. It failed to require the Government to justify with evidence its ban on protected speech. Based on the provocative opinion of the majority, it is clear that the court of appeals refused to acknowledge that *Central Hudson* has evolved into a test much closer to strict scrutiny than to rational basis review. Such impermissibly deferential decisions will recur far too regularly, we fear, until this Court explicitly adopts strict scrutiny as the test for protecting truthful, nonmisleading commercial speech.

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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3. New ſtates may be admitted by the Congreſs into this union; but no new ſtate ſhall be formed or erected within the juriſdiction of any other ſtate; nor any ſtate be formed by the junction of two or more ſtates, or parts of ſtates, without the conſent of the legiſlatures of the ſtates concerned, as well as of the Congreſs.

The Congreſs ſhall have power to diſpoſe of and make all needful rules and regulations reſpecting the territory or other property belonging to the United States; and nothing in this conſtitution ſhall be ſo conſtrued as to prejudice any claims of the United States, or of any particular ſtate.

*Sect.* 4. The United States ſhall guarantee to every ſtate in this union, a republican form of government, and ſhall protect each of them againſt invaſion; and on application of the legiſlature, or of the executive when the legiſlature cannot be convened, againſt domeſtic violence.

ARTICLE V.

The Congreſs, whenever two-thirds of both houſes ſhall deem it neceſſary, ſhall propoſe amendments to this conſtitution, or, on the application of the legiſlatures of two-thirds of the ſeveral ſtates, ſhall call a convention for propoſing amendments, which, in either caſe, ſhall be valid to all intents and purpoſes, as part of this conſtitution, when ratified by the legiſlatures of three-fourths of the ſeveral ſtates, or by conventions of three-fourths thereof, as the one or the other mode of ratification may be propoſed by the Congreſs; Provided, that no amendment which may be made prior to the year one thouſand ſeven hundred and eight, ſhall in any manner affect the firſt and fourth clauſes in the ninth ſection of the firſt article; and that no ſtate, without its conſent, ſhall be deprived of its equal ſuffrage in the ſenate.

ARTICLE VI.

All debts contracted, and engagements entered into, before the adoption of this conſtitution, ſhall be as valid againſt the United States under this conſtitution, as under the confederation.

This conſtitution, and the laws of the United States, which ſhall be made in purſuance thereof; and all treaties made, or which ſhall be made, under the authority of the United States, ſhall be the ſupreme law of the land; and the judges, in every ſtate, ſhall be bound thereby, any thing in the conſtitution, or laws of any ſtate, to the contrary notwithſtanding.

The ſenators and repreſentatives before-mentioned, and the members of the ſeveral ſtate legiſlatures, and all executive and judicial officers, both of the United States, and of the ſeveral ſtates, ſhall be bound, by oath or affirmation, to ſupport this conſtitution; but no religious teſt ſhall ever be required as a qualification to any office, or public truſt, under the United States.

ARTICLE VII.

The ratification of the conventions of nine ſtates ſhall be ſufficient for the eſtabliſhment of this conſtitution between the ſtates ſo ratifying the ſame.

*Done in Convention, by the unanimous conſent of the States preſent, the ſeventeenth day of September, in the year of our Lord one thouſand ſeven hundred and eighty-ſeven, and of the Independence of the United States of America the twelfth. In witneſs whereof we have hereunto ſubſcribed our Names.*

GEORGE WASHINGTON, *Preſident,*
And Deputy from VIRGINIA.

| | |
|---|---|
| NEW-HAMPSHIRE. | John Langdon, Nicholas Gilman. |
| MASSACHUSETTS. | Nathaniel Gorham, Rufus King. |
| CONNECTICUT. | William S Johnſon, Roger Sherman. |
| NEW-YORK. | Alexander Hamilton. |
| NEW-JERSEY. | William Livingſton, David Brearly, William Paterſon, Jonathan Dayton. |
| PENNSYLVANIA. | Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzſimons, Jared Ingerſoll, James Wilſon, Gouverneur Morris. |
| DELAWARE. | George Read, Gunning Bedford, jun. John Dickinſon, Richard Baſſett, Jacob Broom. |
| MARYLAND. | James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carrol. |
| VIRGINIA. | John Blair, James Madiſon, jun. |
| NORTH-CAROLINA | William Blount, Richard Dobbs Spaight, Hugh Williamſon. |
| SOUTH-CAROLINA. | John Rutledge, Charles C. Pinckney, Charles Pinckney, Pierce Butler. |
| GEORGIA. | William Few, Abraham Baldwin. |

Atteſt. WILLIAM JACKSON, *Secretary.*

In CONVENTION, Monday, *Sept.* 17, 1787.

PRESENT,

The States of New Hampſhire, Maſſachuſetts, Connecticut, Mr. *Hamilton* from New-York, New-Jerſey, Pennſylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia:

RESOLVED,

THAT the preceding Conſtitution be laid before the United States in Congreſs aſſembled, and that it is the opinion of this Convention, that it ſhould afterwards be ſubmitted to a Convention of Delegates, choſen in each ſtate by the people thereof, under the recommendation of its legiſlature, for their aſſent and ratification; and that each Convention aſſenting to, and ratifying the ſame, ſhould give notice thereof to the United States in Congreſs aſſembled.

*Reſolved*, That it is the opinion of this Convention, that as ſoon as the Conventions of nine ſtates ſhall have ratified this conſtitution, the United States in Congreſs aſſembled, ſhould fix a day on which electors ſhould be appointed by the ſtates which ſhall have ratified the ſame, and the day on which the electors ſhould aſſemble to vote for the preſident, and the time and place for commencing proceedings under this conſtitution. That after ſuch publication, the electors ſhould be appointed and the ſenators and repreſentatives elected; that the electors ſhould meet on the day fixed for the election of the preſident, and ſhould tranſmit their votes, certified, ſigned, ſealed, and directed, as the conſtitution requires, to the ſecretary of the United States, in Congreſs aſſembled, that the ſenators and repreſentatives ſhould convene at the time and place aſſigned; that the ſenators ſhould appoint a preſident of the ſenate, for the ſole purpoſe of receiving, opening and counting the votes for preſident; and, that after he ſhall be choſen, the Congreſs, together with the preſident, ſhould, without delay, proceed to execute this conſtitution.

*By the unanimous Order of the Convention,*
GEORGE WASHINGTON, Preſident.
*William Jackſon*, Secretary.

## *New-York, Sept. 27.*

ON Monday laſt the Britiſh packet, Halifax, Captain Houldſworth, arrived, with the mail, in 46 days from Falmouth; by whom we have received London papers to the 3d of Auguſt.

Theſe papers inform,——That an extraordinary council met, in London, on the 28th July, to deliberate on the laſt accounts reſpecting the Dutch affairs.——The determination, in ſubſtance, is to this effect; that the popular encroachments on the powers and privileges of the ſtadtholder ſhould be repelled, and the prince of Orange ſhould be maintained in the full enjoyment of every conſtitutional right. In conſequence of this determination, diſpatches were immediately prepared to go with Mr. Eden to the French court, and with Mr. Grenville to Holland.——That all the reports, reſpecting the march of SIXTY THOUSAND Pruſſian troops, is without foundation.——That the Flemiſh accounts, of 60,000 of the emperor's troops being on their march from Germany to the Auſtrian low countries, is, alſo, in every reſpect premature: on the contrary, it is ſaid, deputies are ſent out for Vienna, where there is not a doubt, but the buſineſs will be ſettled equally to the honor of the ſovereign, and the benefit of the inhabitants of Auſtrian Flanders.——That Tippoo Saib, in the eaſt, has gained a decided advantage over the Marhattas; ſince this, overtures have been made for peace with the conquered.——That the Britiſh Parliament was prorogued, on the 31ſt July, to meet on the 23th Oct.——That the Rev. Charles Inglis, D. D. is appointed biſhop of Nova-Scotia.——That a ſhock of an earth-quake was felt, in ſeveral parts of England, on the 6th July.——That more lives have been loſt, and more miſchief done to perſonal property, in England, by late thunder ſtorms, than for many years paſt.——And that a ſubſcription is ſet on foot in the city of London, for the relief of the ſufferers by the late fire in Boſton; on the 31ſt of July ONE HUNDRED and FOURTEEN GUINEAS had been paid into the hands of Sir James Eſdaile, and Co. Bankers, for the above benevolent purpoſe. Subſcriptions were going on rapidly at ſeveral other principal Banking-houſes in that city. It is ſaid that this charitable act originated among the ſociety of Friends (Quakers) and was followed by all denominations of people. It is thought, that by Chriſtmas ſeveral thouſand pounds will be received. Meſſrs. Champion and Dickenſon, merchants, have ſubſcribed Twenty-five guineas.

A letter from Paris, dated July 20, ſays:—"We are aſſured that a Congreſs will be held at Verſailles, conſiſting of the ambaſſadors extraordinary of all the *powers* in Europe, and their important buſineſs is ſaid to be the concluding, and ſigning, a treaty of peace under the general and particular guarantee of all the powers, which is to be inviolably kept up for 30 years. Our Miniſter of foreign affairs has already, it is ſaid, got the conſent of all the republics, and eight crowned heads. If this plan ſucceeds, it will do great honor to the projector of it.

AUTHENTIC *London paragraph!* from the New Daily Advertiſer of Auguſt 18, ſays:—— By the laſt accounts from Philadelphia we find, that there has been a moſt violent party debate in the Convention, about who ſhould be appointed preſident. The northern ſtates propoſed Dr. Franklin, and the ſouthern Gen. Waſhinton, which was carried by one vote in favour of the latter.

On the 21ſt ultimo a reſolve took place in Congreſs, authoriſing the ſuperintendant of Indian affairs, in the northern department, to proceed to Poſt St. Vincents, and there hold a treaty with the Wabaſh, Shawaneſe, and other hoſtile tribes of Indians; hear their complaints; and inform them of the pacific inclination of Congreſs. To inform the Hurons, &c. who joined the repreſentation made to Congreſs, that their repreſentation is received, and will be conſidered in due time.—That the ſecretary at war, by federal troops, effectually protect the frontiers of Pennſylvania, and Virginia, and the federal lands, from Indian intruſions, to promote a favourable iſſue to the intended treaty.—Requeſting that the militia of Virginia, and Kentuckey, hold themſelves in readineſs, to co-operate in the defence of the frontiers, ſhould neceſſity require it, &c. &c.

We learn, that a duel was fought, on Tueſday evening laſt, between Capt. Verdure (a French gentleman, late officer in Count Polaſki's Legion) and Monſieur Chevalier de Longchamps, in which the latter unfortunately fell a victim. It is ſaid, that the conteſt was the reſult of a former diſpute.

A remarkable phœnomenon, which lately appeared in the atmoſphere, at the eaſtward of Boſton, has excited curioſity in ſome, the palpitation of heart in others; and a third claſs have minuted it in their memorandums, as a fore-runner of ſome diſaſterous event. Reports from the phœnomenon, of different kinds, were heard at great diſtances, and the old women of the country, with horror in their looks, declare, that they diſtinctly heard the reports of cannon, muſquetry, fifes drums, and the claſhing of arms.

On Friday night, another daring attempt was made to conſume, by fire, the ſtores in Gouverneur's alley, in order, as it is ſuppoſed, to communicate fire to a large part of the city. It appears by this, that the incendiaries, upon the leaſt relaxation of the patroles, will effect their villainous purpoſe.

The ſhip Juno, Oliver, is arrived in the Britiſh Channel.

☞ *A few Copies of the* FŒDERAL CONSTITUTION *to be had of the Printer hereof.*

The repeated attacks of public foes, foreign correſpondents, and the variety of lures, which have been paſted in different ſtreets countenancing the violation of private engagements, have had an ill effect influence on our national morals, as on our national character. Honeſt men muſt rejoice to ſee a ſpirit of honeſty ſtunning through the NEW CONSTITUTION.—Public ſpirited men muſt rejoice to ſee a proſpect of our national reputation being reſcued from approbrium and diſgrace; and all good men, not blinded by party ſpirit, muſt rejoice to ſee an effort to erect barriers againſt the eſtabliſhment of iniquity by law. The Convention have at leaſt given a diſtinguiſhed proof of their attachment to the principles of probity and rectitude.

Accounts from Worceſter, ſay,——In conſequence of the pardon, lately granted by the executive department of government to thoſe who were under ſentence of death for being concerned in the late rebellion, Henry Gale was releaſed from his impriſonment.

We learn from Philadelphia, that the inhabitants of the diſtricts of Southwark, and the north liberties of that city, aſſembled, have already petitioned the houſe of aſſembly, now ſitting, that the Federal Conſtitution may be adopted as ſpeedily as poſſible by that ſtate.

The firſt public examination was held in ERASMUS HALL, at Flatbuſh, laſt Thurſday; when his Excellency the Governor, with a committee of the honorable Regency of the Univerſity, together with the Truſtees of the Hall and a number of other gentlemen from New-York, attended.—The proficiency of the ſcholars, and particularly the ſpecimens in eloquence, afforded great ſatisfaction.

On Friday laſt arrived here his moſt Chriſtian Majeſty's packet, No. 2, Capt. Couridout, in 36 days, from Havre-de Grace.

Capt. Tinker, in his paſſage from Charleſton to this port, in 39. 30. N. ſaw a ſloop upſet, with a red bottom, white ſtern, yellow ſides, and black wail, burthen between 60 and 70 tons, no perſon on board.

Arrived, at Charleſton, the ſhip Friendſhip, Captain Cauſer, from Larne, with about 200 paſſengers.

The ſhip Nancy, Hall, is arrived at Charleſton (South-Carolina) from London.

MARRIED, On Wedneſday evening, by the Rev. Benj. Moore, Mr. NICHOLAS BREVORT, merchant, to Miſs RACHAEL BLAU, both of this city.

——At Aquaſnock, laſt Thurſday evening, DAVID BROOKS, Eſq. a member of the hon. legiſlature of this ſtate, to Miſs MARIA MALLAM NEIL, ſtep-daughter of Col. Samuel Hay, of Aquaſnock.

——On Friday evening laſt, by the Rev. Mr. Kuntze, Mr. EDWARD PALMER, to Miſs PEGGY BRASHER, both of this city.

Laſt Sunday morning, after a lingering illneſs, which ſhe bore with the moſt exemplary fortitude, departed this life, in the 51ſt year of her age; Mrs. DEBORAH FRANKLIN, the truly amiable conſort of Mr. JOHN FRANKLIN, merchant of this city, and eldeſt daughter of the late ANTHONY MORRIS, Eſq. of Philadelphia. Her remains were, on Tueſday evening, attended by a very numerous and reſpectable concourſe of citizens, of almoſt every denomination, to the Friends Burying-Ground, where they were interred agreeable to the order of the ſociety.

This benevolent lady had, prior to the year 1780, long been ſubject to thoſe acute arthritic complaints, which frequently ſubdue the moſt robuſt, but which ſhe bore with a truly Chriſtian patience. On the 21ſt of November, 1780, the Britiſh commandant, of this city, no longer able to hear of, or bear, the daily accounts of her contributing, with unbounded liberality, to the relief of her fellow-citizens, who were priſoners of war, baniſhed her, without any regard to her ſituation or ſex, or the inclemency of the ſeaſon, from this city, by which act of cruelty ſhe became deprived of the uſe of her feet. But neither the threats, power, nor cruelty of Britons could change her ſentiments relative to the juſtice of her country's cauſe, nor deter her from exerciſing her humanity towards thoſe whom the fortune of war brought within the reach of her relief.—Nor was her benevolence confined merely to thoſe unhappy objects, but extended to all thoſe, without diſtinction, with whoſe diſtreſſes ſhe was acquainted.

As ſhe lived greatly beloved, ſhe died much lamented by thoſe who wiſh to imitate her virtues, and has left a huſband, and ſeven children, to deplore their irretrievable loſs.

☞ *A number of* ADVERTISEMENTS, PIECES, *and* PARAGRAPHS, *are omitted, this week, to give place to the* FŒDERAL CONSTITUTION.—*It is preſumed, that the cauſe of theſe omiſſions will operate as a ſufficient apology to all intereſted therein.*

*For the* NEW-YORK JOURNAL.

*To the* CITIZENS *of the* STATE *of* NEW-YORK,

THE Convention, who ſat at Philadelphia, have at laſt delivered to Congreſs that ſyſtem of general government, which they have declared beſt calculated to promote your ſafety and happineſs as citizens of the United States. This ſyſtem, though not handed to you formally by the authority of government, has obtained an introduction through divers channels; and the minds of you all, to whoſe obſervation it has come, have no doubt been contemplating it; and alternate joy, hope, or fear have preponderated, as it conformed to, or differed from, your various ideas of juſt government.

Government, to an American, is the ſcience of his political ſafety——this then is a moment to you the moſt important—and that in various points—to your reputation as members of a great nation—to your immediate ſafety, and to that of your poſterity. In your private concerns and affairs of life you deliberate with caution, and act with prudence; your public concerns require a caution and prudence, in a ratio, ſuited to the difference and dignity of the ſubject. The diſpoſal of your reputation, and of your lives and property, is more momentous than a contract for a farm, or the ſale of a bale of goods; in the former, if you are negligent or inattentive, the ambitious and deſpotic will entrap you in their toils, and bind you with the cord of power from which you, and your poſterity, may never be freed; and if the poſſibility ſhould exiſt, it carries along with it conſequences that will make your community loſer in its center: in the latter, it is a mere loſs of a little property, which more circumſpection, or aſſiduity, may repair.

Without raſhly eſpouſing or vehemently oppoſing the new form of national government, or of an oppoſite—let me compare you to conſiders it as a very important crisis of your ſafety and conſequence. You have already, in common with the reſt of your countrymen, the citizens of the other ſtates, given to the world ſtriking evidences of your greatneſs—you have fought under peculiar circumſtances, and were ſucceſsful againſt a powerful nation on a ſpeculative queſtion—you have eſtabliſhed an original compact between you and your governors, a fact heretofore unknown in the formation of the governments of the world—your experience has informed you, that there are defects in the federal ſyſtem, and, to the aſtoniſhment of mankind, your legiſlatures have concerted meaſures for an alteration, with as much eaſe as an individual would make a diſpoſition of his ordinary domeſtic affairs: this alteration now lies before you, for your conſideration; but beware how you determine—do not, becauſe you adviſe that ſomething muſt be done, adopt any thing—watch the members of that convention, that you are capable of a ſupervision of their conduct. The ſame medium that gave you this ſyſtem, if it is erroneous, while the door is now open, can make amendments, or give you another, if it is required.—Your fate, and that of your poſterity, depends on your preſent conduct—do not give the latter reaſon to curſe you, nor yourſelves cauſe of reproach from ſurrounding individuals you are ambitious of leaving behind you a good name, and it is the reflection, that you have done right in this life, that blunts the ſharpneſs of death; the ſame principles would be a conſolation to you, as patriots, in the hour of diſſolution, that you would leave to your children a fair political inheritance, untouched by the vultures of power, which you have acquired by an unſhaken perſeverance in the cauſe of liberty—but how miſerable the alternative—you would deprecate the ruin you had brought on yourſelves—be the curſe of poſterity, and the ſcorn and ſcoff of nations.

Deliberate, therefore, on this new national government with coolneſs; analize it with criticiſm; and reflect on it with candour: if you find that the influence of a powerful few, or the exerciſe of a ſtanding army, will always be directed and exerted for your welfare alone, and not to the aggrandizement of themſelves, and that it will ſecure to you and your poſterity happineſs at home, and national dignity and reſpect from abroad, adopt it—if it will not, reject it with indignation—better to be where you are, for the preſent, than inſecure forever afterwards. Turn your eyes to the United Netherlands, at this moment, and view their ſituation; compare it with what yours may be, under a government ſubſtantially ſimilar to theirs.

Beware of thoſe who wiſh to influence your paſſions, and to make you dupes to their reſentments and little intereſts—perſonal intereſtives can never perſuade, but they always ſ prejudices which candor might have removed—thoſe who deal in them have not your happineſs at heart. Attach yourſelves to meaſures, not to men.

This form of government is handed to you by the recommendations of a man who merits the confidence of the public; but you ought to recollect, that the wiſeſt and beſt of men may err, and their errors, if adopted, may be fatal to the community; therefore, in principles of *politics*, as well as in religious faith, every man ought to think for himſelf.

Hereafter, when it will be neceſſary, I ſhall make ſuch obſervations, on this new conſtitution, as will tend to promote your welfare, and be juſtified by reaſon and truth. CATO.

Sept. 26, 1787.

TUESDAY, APRIL 8, 1788. THE VOLUME VII. NUMBER 724.

# INDEPENDENT GAZETTEER;
## OR, THE
# CHRONICLE OF FREEDOM.

*must the People have a Right to Freedom of Speech, and of writing, and publishing their Sentiments; therefore the Freedom of the Press ought not to be restrained.*—Pennsylvania Bill of Rights.

*Let it be impressed upon your Minds, let it be instilled into your Children, that the Liberty of the Press is the* PALLADIUM *of all the civil, political, and religious Rights of* Freemen.—Junius.



From the MARYLAND JOURNAL.

NUMBER I.

*To the* CITIZENS *of* MARYLAND.

TO you, my fellow citizens, I hold myſelf in a particular manner accountable for every part of my conduct in the exerciſe of a truſt repoſed in me by you, and ſhould conſider myſelf highly culpable if I was to withhold from you any information in my poſſeſſion, the knowledge of which may be material to enable you to form a right judgment on queſtions wherein the happineſs of yourſelves and your poſterity are involved—Nor ſhall I ever conſider it an act of condeſcenſion when impeached in my *public* conduct, or character, to vindicate myſelf at your bar, and to ſubmit myſelf to your deciſion. In conformity to theſe ſentiments, which have regulated my conduct ſince my return from the Convention, and which will be the rule of my actions in the ſequel, I ſhall, at this time, beg your indulgence, while I make ſome obſervations on a Publication which the Landholder has done me the honor to addreſs to me, in the Maryland Journal, of the 29th of February laſt.

In my controverſy with that writer, on the ſubject of Mr. Gerry, I have already enabled you to decide, without difficulty, on the credit which ought to be given to his moſt poſitive aſſertions, and ſhould ſcarce think it worth my time to notice his charges againſt myſelf, was it not for the opportunity it affords me of ſtating certain facts and tranſactions, of which you ought to be informed, ſome of which were *undeſignedly* omitted by me when I had the honor of being called before the Houſe of Delegates.

No "extreme modeſty" on my part was requiſite to induce me to conceal the "ſacrifice of reſentments" againſt Mr. Gerry—ſince no ſuch ſacrifice had ever been made—nor had any ſuch reſentments ever exiſted—The *principal* oppoſition in ſentiment between Mr. Gerry and myſelf, was on the ſubject of repreſentation; but even on that ſubject, he was much more conceding than his colleagues, two of whom obſtinately perſiſted in voting againſt the equality of repreſentation in the Senate, when the queſtion was taken in Convention upon the adoption of the conciliatory propoſitions, on the fate of which depended, I believe, the *continuance* of the Convention.

In many important queſtions we perfectly harmonized in opinion, and where we differed, it never was attended with warmth or animoſity, nor did it in any reſpect interfere with a friendly intercourſe, and interchange of attention and civilities.—We both oppoſed the extraordinary power over the militia, given to the general government—we were both againſt the re-eligibility of the preſident—we both concurred in the attempt to prevent members of each branch of the legiſlature from being appointable to offices, and in many other inſtances, although the Landholder, with his uſual regard to truth, and his uſual *impoſing* effrontery, tells me, that I "doubtleſs muſt remember Mr. Gerry and myſelf never voted alike, except in the inſtances" he has mentioned. As little foundation is there in his aſſertion, that I "cautioned certain members to be on their guard againſt his wiles, for that he and Mr. Maſon held private meetings, where the plans were concerted to aggrandiſe, at the expence of the ſmall ſtates, old Maſſachuſetts and the ancient dominion." I need only ſtate facts to refute the aſſertion. Some time in the month of Auguſt, a number of members who conſidered the ſyſtem, as then under conſideration, and likely to be adopted, extremely exceptionable, and of a tendency to deſtroy the rights and liberties of the United States, thought it adviſable to meet together in the evenings, in order to have a communication of ſentiments, and to concert a plan of *conventional* oppoſition to, and amendment of that ſyſtem, ſo as, if poſſible, to render it leſs dangerous. Mr. Gerry was the firſt who propoſed this meaſure to me, and that before any meeting had taken place, and wiſhed we might aſſemble at my lodgings; but not having a room convenient, we fixed upon another place---There Mr. Gerry and Mr. Maſon *did* hold meetings; but with them alſo met the Delegates from New-Jerſey and Connecticut, a part of the delegation from Delaware, an honorable member from South-Carolina, one other from Georgia, and myſelf——Theſe were the only 'private meetings' that ever I knew or heard to be held by Mr. Gerry and Mr. Maſon---meetings at which I myſelf attended until I left the Convention---and of which the ſole object was not to aggrandize the *great* at the expence of the *ſmall*, but to protect and preſerve, if poſſible, the exiſtence and eſſential

THE
# BOSTON
AND
# COUNTRY
# GAZETTE,
THE
# JOURNAL.

[No. 1770.]

*Containing the lateſt Occurrences,*

*Foreign and Domeſtic.*

MONDAY,

*June* 30, 1788.

Printed by BENJAMIN EDES and SON, No. 7, State-Street, BOSTON.

A FREE PRESS MAINTAINS THE MAJESTY OF THE PEOPLE.

## *NOTICE.*

WHEREAS HECTOR LITHGOW, who, in or about the Year 1764, ſerved as a Private in his Majeſty's 77th Regt. then quartered at *Halifax*, in Nova-Scotia left that Place for Great Britain; and proceeded in the ſame Capacity to the Eaſt Indies, where he died in the Year 1784, poſſeſſed of conſiderable Property, and by his laſt Will and Teſtament deviſed the ſame to JOHN and HUGH LITHGOW, his two Sons, who were born in the ſaid Town of Halifax, and lately reſided there, and alſo to FRANCES SWEETING, their Mother: This is therefore to notify the ſaid JOHN and HUGH LITHGOW and FRANCES SWEETING, or any of them, that ſatisfactory information of the whole Tranſaction may be received at Halifax, by applying to Meſſrs. BAYNES and BELCHER; at New York, to THOMAS POPE, Eſq.

N. B. Any who may have it in their Power to give ſatisfactory Information with Reſpect to the above Perſons, or any one of them, ſhall be rewarded for their trouble.

☞ The Printers in the Weſt India Iſlands and the States of America, are deſired to inſert the above Advertiſement; and the charge of the ſame will be diſcharged by tranſmitting their Accounts to either of the above Gentlemen.

Halifax, April 10, 1788.

---

TO BE SOLD

By Public Vendue, by Order of the SUPREME JUDICIAL COURT,

THAT valuable Wharf, Dock, and Flats, belonging to the ſame, ſituate on Fiſh-Street, at the bottom of Croſs Street; known by the name of PULLING's WHARF, with the Ware Houſes or Stores thereon; reſerving liberty to take off a Copper's Shop, built by Capt. Lemuel Gardner the preſent Occupant. The Wharf and Stores may be viewed at any time before the Sale, which will be on the Premiſes, on Thurſday the 10th Day of July next, at 12 o'Clock,

Apply to SARAH PULLING, Executrix.
EDWARD PROCTER, Auctioneer.
(c. t. f.)

---

BOSTON, April 14, 1788.

WHEREAS ſome Perſon or Perſons have acted ſo villainous a Part as to make Uſe of my Name in vending and ſelling SNUFF of a very bad Quality; not only injuring me in my Credit, but cheating the Purchaſer, as the SNUFF manufactured by me is of the beſt Kind, and which I always WARRANT to be ſuch.

SOME of the Purchaſers of ſaid BAD SNUFF, have brought the ſame to me, ſuppoſing it to be REALLY of my Manufacture—but upon Examination, found it to be of a looſe and dry Kind, and may be eaſily diſcovered.

WHOEVER will give Information of the Perſon or Perſons, that thus impoſe upon the Publick, by making uſe of my Name to Vend and Sell ſuch BASE Snuff, ſhall be handſomely rewarded.

By their humble Servant,

Simon Elliot.

☞ The Publick are informed, that to prevent the above deception, the Advertiſements on Bladders of Snuff, in future, will be altered from Letter-preſs, to a Copperplate Impreſſion.

---

*SUFFOLK*, ſs. ALL Perſons claiming Property in three Cheſts of Bohea Tea, and Fifty-eight Loaves of White Sugar, ſeized by *James Lovell*, Eſq; Collector of Impoſt and Exciſe for ſaid County, for illegal Importation—are hereby notified to appear at the Court of Common Pleas to be held at *Boſton*, on the Firſt Tueſday of *July* next, and ſhew Cauſe (if any they have) why the ſame Tea and Sugar ſhould not be adjudged Forfeit.

EZEKIEL PRICE, *Clerk.*

---

WHEREAS, Elizabeth, the Wife of the Subſcriber, has behaved herſelf in an unbecoming manner—Theſe are therefore to forbid all Perſons from truſting her on my account, as I will not pay one farthing ſhe may contract after the above date.

JOHN LAURENCE.

BOSTON, June 20, 1788.

---

IMPORTED in the laſt Veſſels from LONDON,
AND TO BE SOLD,

By JAMES WHITE,

At FRANKLIN's HEAD, COURT STREET,
A general Aſſortment of BOOKS and STATIONARY,
By Wholeſale and Retail, viz.

LARGE and ſmall BIBLES, Engliſh, French, and Latin DICTIONARIES, Grammars, School Books, Seamen's Books, Book Keeping, Arithmetic, Geography, ſmall Hiſtories, Teſtaments, Pſalm Books, Spelling Books and Primmers, Account Books, and Record Books of all ſizes, Ink Powder, Ink Cake, Wax, Wafers, Copy Slips, Writing Books, &c.

ALSO,

A Large Aſſortment of Superfine, Middling and Common

Writing Paper,

Of all ſizes, qualities and Prices, Thick, Thin, and Extra Thin Letter Paper, Plain and Gilt, Dutch Quills, from 2/8 to 5/ per hundred, &c.

Every Article will be ſold on as good terms as at any Store or Shop in BOSTON, and great allowance to thoſe who purchaſe by the quantity.

BOSTON, May 21, 1788.

---

*Jonathan Haſtings,*

INFORMS the Public, and particularly his Cuſtomers, That he has removed his SHOP and the POST-OFFICE, from No. 35 to No. 41, Cornhill, next Door to where the Poſt Office was kept before the late War;

WHERE HE HAS FOR SALE,

A general Aſſortment of STATIONARY, and freſh Single, Souchong, Common, Green and Hyſon TEAS.

---

Suffolk ſs. ALL Perſons claiming Property in Three Barrels of Sugar, and One Quarter Caſk of Wine, ſeized by THOMAS MELVILLE, Eſq. Naval-Officer for the port of Boſton, for Breach of the Laws of this State, are hereby Notified to appear, and ſhew cauſe (if any they have) at a Court of Common Pleas, to be held at Boſton, on the firſt Tueſday of July next, why the ſame Sugar and Wine ſhould not be adjudged forfeit. By Order

EZEKIEL PRICE, Clerk.

---

THE Members of the SOCIETY of the CINCINNATI of this Commonwealth are hereby notified, that their annual meeting will be held at the Bunch of Grapes Tavern in Boſton, on the Fourth of July next, at ten o'clock A. M.

An Oration will be delivered in the forenoon by General HULL; and thoſe Members who have not received their Diplomas, can obtain them from the Treaſurer the evening preceding the fourth.

N. B. Dinner at three o'clock.

W. EUSTIS, Vice-Preſident.

☞ The Printers of the ſeveral papers in this Commonwealth, will inſert the above.

Boſton, May 17, 1788.

---

TAKEN up aſtray in Dedham, on the 10th of April laſt, a ſmall Red COW, judg'd to be about 8 years old, part of the Bag and Tail White. Whoever has loſt the ſame, by applying to Mr. Thomas How, 3d. of Dedham, and proving their Property, ſhall have her again, paying Charges.

---

[From the New Hampſhire Gazette, of May 29.]

THE public are cautioned to beware of counterfeit Certificates, done in imitation of thoſe iſſued for intereſt and fifteen per cent. of the principal on Notes of this State, dated July 31ſt, 1787. The whole impreſſion is pale when compared with thoſe that are genuine and the letters in the Counterfeits, are ſmaller.—The N° in the beginning of the Certificate in the true ones, the o is near the top of the N. thus N°. in the Counterfeits the o is at the bottom thus N°. The top of the J in the beginning of the Certificates in thoſe that are genuine is above the I in the counterfeit, rather lower. There are ſeveral other marks, but thoſe mentioned may be ſufficient to detect them.

EXETER, May 22, 1788.

*.* The ſeveral Printers in the United States are requeſted to inſert the above in their News Papers.

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By the UNITED STATES in CONGRESS aſſembled, May 8th, 1788.

ON a report of the Board of Treaſury, to whom was referred a motion of Mr. Carrington,

RESOLVED, That Congreſs proceed to the election of two Commiſſioners for ſettling the accounts of the five great departments, to continue in office one year.

ORDERED, That the Commiſſioners of Accounts for the quartermaſter's, commiſſary's, hoſpital, marine and cloathing departments, with the approbation of the Board of Treaſury, commence ſuits in behalf of the United States, againſt all perſons in any of the ſaid departments, who ſtand chargeable with public monies, and whoſe accounts ſhall not be lodged with the proper Commiſſioners within four months, computed from the preſent date; and that this order be publiſhed in the ſeveral ſtates for the period above mentioned.

RESOLVED, That the ſaid Commiſſioners be directed to continue their unremitted attention to the final adjuſtment of all accounts which have ariſen in the ſaid departments, and to the recovery of all ſums for which ſuits may be commenced; and that at the termination of their commiſſion, they depoſit with the Regiſter of the Treaſury all the books and papers of their reſpective offices, together with a general abſtract of the ſums due from individuals, in order that immediate meaſures may be adopted for the recovery of the ſame.

Congreſs proceeded to the election, and the ballots being taken,

Mr. JONATHAN BURRALL was elected a Commiſſioner for ſettling the accounts of the quartermaſter's and commiſſary's departments, and

Mr. BENJAMIN WALKER was elected Commiſſioner for ſettling the accounts of the hoſpital, marine, and cloathier's departments.

CHARLES THOMPSON, Secretary.

---

On the National Conſtitution.

SHOULD the citizens of America ratify the proceedings of the Convention, the happy event will form an epocha more peculiar in its nature, more felicitating in its conſequence, and more intereſting to the philoſophic mind, than ever the political hiſtory of man has diſplayed. Where is the country in which the principles of civil liberty and juriſprudence are ſo well underſtood as in this; and where has ever ſuch an aſſembly of men been deputed for ſuch a purpoſe? To ſee an aſſemblage of characters, moſt of them illuſtrious for their integrity, patriotiſm and abilities repreſenting many ſovereign States; framing a ſyſtem of government for the whole, in the midſt of profound peace; unembarraſſed by any unfavourable circumſtances abroad, unbiaſſed by any ſelfiſh motives at home; but making the moſt generous conceſſions to each other for the common welfare, and directing their deliberation with the moſt perfect unanimity; To ſee a conſtitution of government thus formed, and fraught with wiſdom, œconomy and foreſight, adapted to the political habits of their conſtituents, to the ſtate of ſociety and civilization, to the peculiar circumſtances of their country, and to thoſe enlightened ſentiments of freedom and toleration, ſo dear to all poſſeſſion: And, finally, to ſee this conſtitution ratified and adopted by ſeveral millions of people, inhabiting an extenſive country, not from any coertion, but from mere principles of propriety, wiſdom and policy: Theſe are objects too great and too glorious to be viewed with common admiration and delight: The idea alone is animating to every boſom ſuſceptible of the emotion of patriotiſm or philanthrophy: The attempt alone reflects dignity upon human nature, and the execution ſecures freedom and publick happineſs to remote poſterity.

This great event will diſcloſe the meaning of thoſe many aſtoniſhing providences which gave victory and to the American arms in the juſt ſtruggle for independence. From this it will appear, that theſe were not intended to uſher in, upon this recent theatre of cultivated humanity, the horrors of domeſtic jarring; but to eſtabliſh, upon the ſtrongeſt baſis, union, freedom and tranquility. The prerogative of the great guardian of nations, to educe good from evil, will become illuſtrious. Our reproach abroad, and diſarrangement at home, will but ſhew us in contraſt, the magnitude of our change. The light of proſperity will but ſhine the brighter, as juſt burſting from the diſſipated clouds of injuſtice, avarice and ambition.

Let us then be of one heart and of one mind. Let us ſeize the golden opportunity to ſecure a ſtable government, and to become a reſpectable nation. Let us be open decided and reſolute in a good cauſe. Let us render our ſituation worthy the aſhes of our ſlaughtered brethren, and our own ſufferings. Let us remember our emblem, the twiſted ſerpent, and its emphatical motto, UNITE OR DIE! This was once written in blood; but it is as emphatical now as then. A houſe divided againſt itſelf cannot ſtand. Our national exiſtence depends as much as ever upon our union; and its conſolidation moſt aſſuredly involves our poſterity, felicity and ſafety.

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(9)



No. 98-387

In The

# Supreme Court of the United States

October Term, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., individually and on behalf of its members; PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURHAM BROADCASTING COMPANY, A Limited Partnership,

*Petitioners,*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves not only the level of constitutional protection afforded commercial speech, but is of fundamental importance to both a market economy and to consumers. The Institute's brief critiques the federal government's ban on casino advertising primarily from the perspective of the ultimate beneficiary of commercial information: the consumer.

## STATEMENT OF THE CASE

Federal law currently prohibits radio and television stations from broadcasting advertisements for lawful casino gaming. 18 U.S.C. § 1304. Originally enacted in the Communications Act of 1934 as a comprehensive ban on

[1] In conformity with Supreme Court Rule 37, the Institute for Justice has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. The Institute also states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

gaming advertisements, *see* ch. 552, § 316, 48 Stat. 1088, over the last 25 years, Congress has created numerous exceptions to this prohibition. Most notably, advertisements for Indian casinos[2] and wagers on sporting events[3] may legally air throughout the nation while state lottery promotions may be broadcast on stations located in those jurisdictions sponsoring lotteries.[4]

As the federal government has relaxed restrictions on gaming advertisements, so too have states moved in the direction of liberalized gaming laws. Today, some form of legalized gaming is allowed in 47 states, with private, non-Indian casinos legal in 11 states and Indian casinos now operating in 26 states.[5] As a result, three-fourths of Americans now live within 300 miles of a casino. *See* Mary Lynne Vellinga, "Questions Make Casino Operators Nervous," *Sacramento Bee*, Feb. 5, 1996, at A6.

Given the growth in the gaming industry, it is not surprising that broadcasters seeking to air casino advertisements along with private casinos themselves have challenged the constitutionality of federal advertising restrictions in three recent lawsuits. Courts in two of these cases have struck down the prohibition as violating

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[2] *See* 25 U.S.C. § 2701.

[3] *See* 18 U.S.C. § 1307(d).

[4] *See* 18 U.S.C. § 1307(a)(1), (2). Advertisements for fishing contests and charitable lotteries as well as occasional and ancillary commercial lotteries are also exempted from the ban. *See* 18 U.S.C. § 1305, *id.* at § 1307(a)(2)(A), (B).

[5] While entities often referred to as Indian casinos are located in 28 states, in two of these states, the "casinos" only offer bingo.



broadcasters' and casinos' free speech rights under the First Amendment. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997); *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997).

In the instant case, however, both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit in a 2-1 vote have upheld the constitutionality of the advertising ban. *See Greater New Orleans Broadcasting Ass'n v. United States*, 69 F.3d 1296 (5th Cir. 1995); *Greater New Orleans Broadcasting Ass'n v. United States*, 866 F. Supp. 975 (E.D. La. 1994). When petitioners initially asked for a writ of *certiorari*, this Court remanded the case for reconsideration in light of its decision in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), where the Court unanimously invalidated Rhode Island's ban on the price advertising of liquor and strengthened the scrutiny applied to commercial speech restrictions. On remand, however, the Fifth Circuit once again rejected petitioners' challenge by a 2-1 vote. *See Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334 (5th Cir. 1998). The question on which this Court has now granted *certiorari* is whether "the federal government may, consistent with the First Amendment, undertake to suppress lawful casino gaming by banning truthful non-misleading broadcast advertising for such gaming."

## SUMMARY OF ARGUMENT

This Court should no longer recognize an artificial distinction between "commercial" and "noncommercial" speech. Under the First Amendment, "commercial" and "noncommercial" speech should be granted equal protection, and all regulations restricting the dissemination of truthful commercial information should be subject to strict scrutiny review. As the facts of this case demonstrate, consumers not only have a "keen" interest "in the free flow of commercial information," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976), but such advertising can also provide knowledge highly relevant to pressing political disputes.

The federal government may not, consistent with the First Amendment, paternalistically deny consumers truthful information about lawful casino gaming for fear they may use it unwisely. As Justice Stevens recognized in *44 Liquormart*, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 517 U.S. at 503.

Rather than protecting consumers from the harms of gaming, this advertising ban, like other commercial speech restrictions, hurts consumers. Advertising plays a vital role in the efficient operation of our free enterprise economy. When it is restricted, consumers are less able to make informed economic decisions, have fewer choices in the marketplace, and encounter higher prices.

Advertising restrictions are often motivated by economic protectionism; competition both between products in the same market and between different product groups



is distorted when the government selectively curtails free speech rights. It is thus crucial that this Court require a tight fit between the ends and means of commercial speech restrictions, or illegitimately motivated restrictions will survive constitutional challenge.

Whether this Court explicitly analyzes the federal law under the rubric of strict scrutiny or instead applies the *Central Hudson* test, the ban on private casino advertising fails to pass constitutional muster.

## ARGUMENT

### I. TRUTHFUL COMMERCIAL SPEECH SHOULD BE GRANTED THE SAME PROTECTION UNDER THE FIRST AMENDMENT AS OTHER FORMS OF SPEECH AND EXPRESSION

In *Virginia State Board of Pharmacy*, this Court eliminated any doubt as to whether commercial speech is protected by the First Amendment. Invalidating a Virginia statute prohibiting licensed pharmacists from advertising prescription drug prices, the Court noted that the "free flow of commercial information is indispensable" to the functioning of our free enterprise economy, 425 U.S. at 765, and observed that "a consumer's interest in the free flow of commercial information" may be greater "than his interest in the day's most urgent political debate." *Id.* at 763.

Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court held that a New York regulation banning promotional advertising by electric utilities ran afoul of the

First Amendment. In *Central Hudson*, however, the Court distinguished "commercial" speech from "noncommercial" speech, defining the former as "expression related solely to the economic interests of the speaker and its audience," *id.* at 561, or "speech proposing a commercial transaction." *Id.* at 562. It then said that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63.

A four-part test was formulated for reviewing the constitutionality of commercial speech restrictions:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

*Id.* at 566. The Court has since applied the *Central Hudson* test in analyzing a variety of commercial speech restrictions, striking down some while upholding others. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating regulation prohibiting beer labels from displaying alcohol content); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down regulation banning in-person solicitation by certified public accountants); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (invalidating ordinance prohibiting distribution of commercial handbills); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding law restricting advertisements of casinos in Puerto Rico).



This Court's rigid segregation of commercial speech jurisprudence from the rest of First Amendment doctrine, however, was called into question by its recent decision in *44 Liquormart*. The Court produced four separate opinions in unanimously striking down a Rhode Island statute prohibiting the price advertising of liquor. Rhode Island had justified the ban as a bid to promote temperance among its citizens.

Justice Thomas, writing for himself, argued that the Court should no longer apply the *Central Hudson* test in those cases where the government seeks to restrict truthful information for the purpose of keeping consumers in the dark and thus "manipulating their choices in the marketplace." *Id.*, 517 U.S. at 518. And Justice Stevens, in a portion of his opinion joined by Justice Kennedy and Justice Ginsburg, rejected the proposition that "all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression." *Id.* at 501. Justice Stevens reasoned that prohibitions of truthful, non-misleading advertising rarely protect consumers from the " 'commercial harms' that provide[ ] 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' " *Id.* at 502 (*quoting Discovery Network*, 507 U.S. at 426). Although not explicitly calling for strict scrutiny review of bans on the dissemination of truthful, non-misleading commercial information, Justice Stevens cast considerable doubt as to whether such restrictions should be subjected to less than

"the rigorous review the First Amendment generally demands." *Id.* at 501.[6]

### A. The distinction between commercial and noncommercial speech is unprincipled and untenable.

As both Justice Thomas and Justice Stevens have suggested, it is time for this Court to abandon its artificial and rigid distinction between "commercial" and "noncommercial" speech. Regardless of the standard used to review misleading or coercive speech, a strict scrutiny analysis should be adopted for restrictions on the publication or broadcast of truthful commercial information.

The artificiality of the demarcation separating commercial speech from noncommercial speech is illustrated by the facts of the instant case. Under the federal statute at issue here, a news report may inform television viewers of the various gaming opportunities offered at a particular casino (e.g., craps, blackjack, or roulette), but a commercial advertisement containing exactly the same information may not air. Even though the content of the speech may be identical, the news report, it is argued, is "noncommercial" speech and thus entitled to a higher level of constitutional protection than the advertisement, which is stuck with the Scarlet Label of "commercial" speech.

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[6] Justice Scalia also expressed "discomfort with the *Central Hudson* test" in his separate concurring opinion. *44 Liquormart*, 517 U.S. at 516.



But if the information conveyed is the same, what justifies the disparate treatment? The chief difference is that in one example, information is contained in an advertisement, which has the chief purpose of encouraging a specific economic transaction, while in the other example, the information is communicated as part of a broadcast which has the principal intent of enlightening or entertaining a general audience. But as Justice Stevens has observed, "economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors or artists who sell their works would be correspondingly disadvantaged." *Rubin*, 514 U.S. at 491 (Stevens, J., concurring). Moreover, with the exception of public television and radio, news broadcasts must lure an audience so that advertisers will buy commercial spots. The content of these programs is therefore designed to attract audience interest so that viewers can be exposed to commercial messages. So while the route is more indirect, radio and television news also has as one of its purposes the promotion of certain economic transactions.

This Court has offered two rationales for subordinating the protection of "commercial" speech: first, its accuracy is more easily verifiable than other forms of expression; and second, it is less likely to be chilled due to the power of the profit motive. *See Central Hudson*, 447 U.S. at 564 n.6; *Virginia Pharmacy*, 425 U.S. at 771 n.24. These unfounded assertions, however, do not support diminished constitutional protection for the dissemination of truthful commercial information.

Commercial information is no more "objective" or "verifiable" than much of the news published in the

morning paper. The price of a McDonald's hamburger, for example, is as easily ascertainable as the score of a Detroit Tigers baseball game or the results of congressional elections. In any event, it is unclear why less scrutiny should be applied to efforts to suppress "objective" or "verifiable" information. If anything, the conclusion is counterintuitive. One would think that the dissemination of truthful information, commercial or noncommercial, would be entitled to the highest level of constitutional protection.

Similarly, it is by no means clear that commercial speech is hardier or less easily chilled than other forms of expression. An author's passion to write, for instance, may be far greater than his motivation to advertise his work. And an animal-rights or anti-abortion activist may be far less dissuaded by restrictive speech regulation than an entrepreneur. Even, however, if the Court's theory regarding the power of the profit motive, as a predictive matter, has merit, its reasoning seems irrelevant to the question of what standard should be used to scrutinize attempts to suppress truthful commercial information. The government should not be granted more leeway in restricting the free flow of information simply because certain information may be difficult to suppress.

Both Justice Stevens and Justice Thomas recognized in *44 Liquormart* that the Court's stated rationales for distinguishing "commercial" from "noncommercial" speech fail to justify reviewing bans on the dissemination of truthful, non-misleading speech with a lower level of scrutiny than that normally applied under the First Amendment. *See 44 Liquormart*, 517 U.S. at 502 (Stevens, J., principal opinion) ("neither the 'greater objectivity'



nor the 'greater hardiness' of truthful, non-misleading commercial speech justifies reviewing its complete suppression with added deference."); *id.* at 523 n.5 (Thomas, J., concurring) ("neither of these rationales provides any basis for permitting government to keep citizens ignorant as a means of manipulating their choices in the marketplace."). Absent any coherent rationale for distinguishing truthful "commercial" speech from truthful "noncommercial" speech, this Court should review the federal government's attempt to prohibit the broadcast of casino gaming advertisements with strict scrutiny.

### B. Commercial speech is critically important to informed public debate on important political issues.

The robust exchange of commercial information is vital to the health of our free market economy. As Justice Blackmun noted, "[s]o long as we preserve a predominantly free enterprise economy, the allocation of resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable." *Virginia Pharmacy*, 425 U.S. at 747.

But Justice Blackmun not only recognized the economic value of commercial speech, he also understood its importance to public policy debates. *See id.* In *Virginia Pharmacy*, Justice Stewart similarly explained that information about drug prices could impact "a person's views

concerning price control issues, government subsidy proposals, or special health care, consumer protection, or tax legislation." *Id.* at 780 n.8.

This case, perhaps better than any commercial speech case ever to come before this Court, demonstrates the crucial link between commercial speech and political discourse. The question of whether casinos and other forms of gaming should be legalized is one of the burning issues of our time.[7] Residents of numerous states have recently seen the issue debated in either their state's legislature or in a referendum campaign.[8]

The federal government's ban on private casino advertising, however, hampers discussion of this important political issue. *See 44 Liquormart*, 514 U.S. at 503 ("commercial speech bans . . . impede debate over central issues of public policy."). It is a matter of common sense that truthful information about casinos would be helpful to Americans evaluating whether casino gaming should be legal.[9] The more knowledge a voter has about any

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[7] *See* Jill Lawrence, "Politicians Roll the Dice on Gambling," *USA Today*, July 20, 1998, at 8A.

[8] *See, e.g.*, Tom Buckman, "Gamble Pays Off in Ontario; Buffalo Weighs Its Entrance into the Gaming Arena," *The Buffalo News*, Jan. 31, 1999, at 12 (referring to New York State Legislature's rejection of attempts to legalize casino gaming); Rick Alm, "The Battle Over Boats in Moats," *The Kansas City Star*, Oct. 18, 1998, at A1 (analyzing Missouri referendum campaign); Zachary Coile, "Indian Casinos: Big Money Battle," *San Francisco Examiner*, Aug. 2, 1998, at A1 (describing California referendum fight).

[9] *See United States v. Edge*, 509 U.S. 418, 438 n.2 (Stevens, J., dissenting) ("advertising relating to the Virginia lottery may be of interest to those in North Carolina who are currently debating whether that State should join the ranks of the growing number of States that sponsor a lottery.").



issue, the better able he or she is to reach an informed judgment. Any attempt to suppress the distribution of information about casino gaming when it takes the form of "commercial" speech impoverishes the political debate, eliminating one important avenue for citizens to discover facts relevant to a pressing political dispute.[10] The importance of commercial information to the casino gaming debate elucidates the folly of strictly segregating "commercial" from "noncommercial" speech and provides another reason why the federal government's ban should be reviewed under strict scrutiny.

## II. THE FEDERAL GOVERNMENT'S CASINO ADVERTISING BAN IS DETRIMENTAL TO THE INTERESTS OF CONSUMERS

Although petitioners represent broadcasting outlets seeking to air casino advertisements, this case is of profound importance to those who are the ultimate beneficiaries of commercial information: consumers. This Court has long recognized both the legal right of consumers to receive advertising, *see Virginia Pharmacy*, 425 U.S. at 757

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[10] It is not entirely clear, however, which side of the political debate would be aided by casino advertisements. Although promotional advertising might cause voters to be more favorably disposed towards casinos, it is also possible that greater awareness of the presence of casinos could sour popular support for their continued operation. There are certain activities, after all, the public will tolerate only so long as they remain hidden.

("if there is a right to advertise, there is a reciprocal right to receive the advertising"), and the value of advertising in allowing consumers to make intelligent and well-informed decisions. *See id.* at 765. Here, however, the government paternalistically asserts that consumers will be better off if they remain ignorant.

The federal government argues that its prohibition of private casino advertisements directly and materially advances its interest in reducing the prevalence of compulsive gambling. The Fifth Circuit, however, noted that the government's position "suffers fatally . . . because none of its sources specifically connect casino gaming with broadcast advertising for casinos." *Greater New Orleans Broadcasting Ass'n*, 149 F.3d at 339. Notwithstanding the government's failure to offer evidence supporting the efficacy of the advertising restrictions, however, the panel majority cited many of its own sources on the nature of compulsive gambling to justify upholding the ban.

While many of these articles and studies detail the alleged evils caused by compulsive gambling, only an op-ed by William Safire draws any link whatsoever between advertising and compulsive gambling.[11] And Safire's column merely reports that "many psychiatrists" *suggest* a link between gambling addiction and casino advertising currently allowed under the law; the columnist himself admits that the theory has yet to be proven. *See* William

[11] While Safire asserts that advertising may lead to compulsive gambling, he is referring to advertising currently allowed under the law, such as billboards and newspaper advertisements, rather than broadcast advertisements.



Safire, "A Gambling Lesson: There's Now a Sucker Born Every Second," *Dallas Morning News*, June 6, 1998, at 11A.

With all due respect to Mr. Safire, the Fifth Circuit's analysis flies in the face of this Court's admonition that "speculation or conjecture" cannot be used to show that a commercial speech restriction directly advances the government's asserted interest in suppressing speech under the third prong of the *Central Hudson* test. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The unsupported assertions of unnamed "psychiatrists" regarding the effect of those casino advertisements which are now legal do not even come close to proving that current casino advertising restrictions alleviate the harms of compulsive gambling "to a material degree," *Edenfield*, 507 U.S. at 771, but rather more resemble the paucity of empirical support offered by the State of Rhode Island to justify its ban on the price advertising of liquor in *44 Liquormart*. The federal government's casino advertising ban should therefore meet the same fate as the Rhode Island statute.

Every year, millions of Americans legally choose to gamble in casinos, and it is these consumers who are most harmed by the federal government's advertising restrictions. Advertising restraints, by their very nature, are anti-competitive. The ability to advertise is vital to new entrants into a market, whether it be casinos or some other sector of the economy. New businesses must advertise to create awareness of their products among consumers. Commercial speech restrictions therefore work to the advantage of established businesses and to the disadvantage of their potential rivals.

Before the ban on the television advertising of cigarettes was imposed in 1970, for example, approximately one new brand of cigarettes was successfully launched each year. But during the first four years of the prohibition, no new product was able to successfully enter the market. *See* Ekeland, Jr. & Saurman, *Advertising and the Market Process: A Modern Economic View* 94 (1988). The moral of the story is clear: "advertising functions as a tool of entry, making markets more, not less, competitive." *Id.* at 95. When advertising is restricted, consumers are provided with fewer choices in the marketplace, and entrepreneurs are hindered in attempting to start new businesses.[12]

The pro-competitive effect of advertising also reduces prices for consumers.[13] By providing a path for

[12] By freezing competitors out of the marketplace, commercial speech restrictions can be quite counterproductive. Cigarette advertising on television, for example, was prohibited in order to improve public health. But "the ban on TV cigarette advertising unquestionably slowed the introduction of low-tar and low-nicotine cigarettes." Ekelund, Jr. & Saurman at 137.

[13] By transferring price information to consumers, advertising plays a vital role in the operation of the price system, which is an integral component of our free market economy. In his seminal essay, *The Use of Knowledge in Society*, Friedrich Hayek recognized that the price system is the central organizing mechanism of a market economy. He explained, "It is more than a metaphor to describe the price system as a kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust activities to changes of which they may never know more than is reflected in the price movement. . . . Through [the price system] not only a division of labor but also a coordinated utilization of resources based on an equally divided knowledge has become possible." Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945), *reprinted in The Essence of Hayek* 211, 219-21 (Nishiyama & Leube eds. 1984).



competitors to gain a foothold in a market, advertising reduces the likelihood that any company either will gain market power and thus have the ability to increase prices or will seek to exploit any market power they are able to acquire by raising prices. Price advertising also decreases the search costs for consumers seeking the lowest price for a certain good or service. The ability of consumers to use commercial information to compare the prices offered by different companies thus limits the amount that businesses are able to charge. *See id.* at 123. One study, for example, found that billboard advertising at gas stations reduced gas prices by five to eight percent. *See* Kelly and Maurizi, *Prices and Consumer Information: The Benefits from Posting Retail Gasoline Prices* 35 (1978).

Commercial speech restrictions therefore have the net effect of raising prices. One study compared the prices of eyeglasses in the 1960s in those states that banned the advertising of eyeglasses and eye examination prices with those that did not. The author concluded that advertising prohibitions increased prices in the eyeglasses market to a statistically significant degree, with price increases ranging from ten to 25 percent. *See* Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. of Law and Econ. 337-52 (1973). A study sponsored by the Federal Trade Commission in the 1980s similarly discovered that advertising restrictions in the market for legal

services led to markedly higher prices. William Jacobs et al., *Improving Consumer Access to Legal Services: The Case for Removing Truthful Restrictions on Commercial Advertising, Report of the Staff of the Federal Trade Commission* (1985). Prices were higher in those states that significantly restricted lawyer advertising than those states with relatively liberal advertising rules. *See id.*

In the casino gaming context, price is measured in terms of expected payout: the amount of one's money that a person can expect to win back on average at a particular game. For example, a slot machine's expected payout might be 90 percent of money wagered, so the effective price of gaming is 10 percent of one's wager. Las Vegas casinos, among others, currently advertise expected payouts on billboards seeking to entice customers with the promise of higher payouts, or in other words, lower prices. Perversely, the federal government's ban on the broadcast of casino advertisements frustrates this price competition and therefore increases gamblers' losses.

Besides providing consumers with more choices and reduced prices, advertising also enhances the quality of goods and services offered in the marketplace. As stated before, advertising reduces consumers' search costs; it not only lowers consumers' costs of locating a less expensive product but also of finding a higher quality product. By lowering consumers' search costs, advertising makes it easier for a consumer to switch products if he becomes dissatisfied. *See* Ekeland, Jr. & Saurman at 120. This places pressure on companies to offer high-quality goods and services or else run the risk of losing business. *See id.*



An FTC study on the quality of eyecare services provides empirical support for this conclusion. Many states restrict, either by statute or licensing regulations, the ability of optometrists to advertise their services. The FTC discovered, however, that the quality of hard contact lens fitting service was higher among those optometrists that advertised than those that did not. *See* Hailey, et al., *A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians, Report of the Staff of the Federal Trade Commission* (1983).

The federal government claims that its ban on casino advertising is designed to protect Americans from the harms of compulsive gambling. But it provides no evidence establishing that consumers are better off when denied truthful, non-misleading information about casinos. Instead, American consumers are the ultimate losers under the casino advertising ban. They are left in a market position "of less information, reduced choice and a strong likelihood of higher prices." Ekelund Jr. & Saurman at 150.

## III. THIS COURT SHOULD REQUIRE A TIGHT FIT BETWEEN THE MEANS AND ENDS OF COMMERCIAL SPEECH RESTRICTIONS, A FIT NOT PRESENT IN THE FEDERAL GOVERNMENT'S CASINO ADVERTISING BAN

The federal government's scheme for regulating the broadcast of gaming advertisements is quite odd. The government justifies its ban on the broadcast of private casino advertisements with its need to combat the harms

caused by compulsive gambling and its desire to protect the interests of those states where private casinos are illegal. Yet, federal law currently permits advertisements for Indian casinos and sports wagering to be aired in all 50 states.

These are far from *de minimis* exceptions to the ban. Indian casinos, for example, currently operate in 26 states, and in 1996, more money was wagered in Indian casinos than in all Atlantic City casinos combined. *See Staff Report of National Gambling Impact Study Commission: Native American Gaming* (1998). Indian casinos generally offer the same games as most private casinos: craps, roulette, blackjack, etc. The federal government has not argued (and indeed could not successfully argue) that wagering in Indian casinos is less likely to lead to gambling addiction than wagering in private casinos. Yet, the government allows the broadcast of Indian casino advertisements while at the same time curtailing the free speech rights of private casino operators.

The exceptions to the ban also make a mockery of the government's asserted interest in protecting the interests of those states where casino gaming is illegal. Setting aside the question of whether it is even permissible to keep the citizens of one state in the dark about activities that are legal in another state,[14] an anti-casino state has

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[14] *Compare Bigelow v. Virginia*, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising by out-of-state providers), *with United States v. Edge*, 509 U.S. 418 (1993) (upholding constitutionality of federal statute restricting broadcast of lottery advertisements to stations located in those states sponsoring lotteries).



the same interest in "protecting" its citizens from Indian casinos as it does in "protecting" its citizens from private casinos. Yet, under the statute the government asks this Court to uphold, only advertisements for Indian casinos are legal.

The Court signaled in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), that the government could not selectively restrict commercial speech in a manner casting doubt on its claimed motivation for doing so. In *Coors*, the Court unanimously struck down a federal regulation prohibiting beer labels from displaying alcohol content. The government asserted that its regulation was motivated by its interest in preventing "strength wars" from breaking out between rival beer brands. Yet, the government allowed alcohol content to be disclosed in beer advertising in most of the country and indeed required labels of wines with more than 14 percent alcohol to display alcohol content.

The Court noted the overall regulatory scheme made little sense if the government's true interest was in suppressing strength wars among alcoholic beverages and held that the specific regulation involving beer labels therefore failed to directly and materially advance the government's stated interest in restricting speech. *Id.* at 488. Following this Court's lead, the Ninth Circuit in *Valley Broadcasting v. United States*, 107 F.3d 1328 (9th Cir. 1997), cited the exceptions to the casino advertising ban in striking down the federal statute at issue here. The Ninth Circuit held that the ban on the broadcast of private casino advertisements could not directly and materially advance either of the government's asserted interests in restricting speech so long as the government

continued to permit the broadcast of numerous gaming advertisements, including those for Indian casinos. *Id.* at 1334-36.

The Fifth Circuit, however, rejected the Ninth Circuit's view, observing that the federal government's decision to allow the broadcast of Indian casino and sports wagering advertisements while prohibiting the broadcast of private casino advertisements was a "quintessentially legislative choice[ ]." *Greater New Orleans Broadcasting Ass'n*, 69 F.3d at 1301. The panel majority's analysis, however, is fundamentally in error as this Court has made it clear that commercial speech restrictions are to be reviewed under heightened scrutiny rather than rational basis review. Therefore, the scope of such restrictions must not be a "quintessentially legislative choice."

This Court has firmly established that commercial speech restrictions must be "narrowly tailored" to advancing the government's asserted interests. *See 44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring) (*quoting Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Restrictions that are overly broad, prohibiting more speech than necessary to accomplish the government's stated purpose, chill constitutionally protected expression and call into question the government's true motives in suppressing speech. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (purpose of requiring fit between means and ends of racial classifications is to "smoke out" illegitimate motives).

This Court, however, has also guarded against speech restrictions which selectively curtail expression with little apparent rhyme or reason. In *City of Cincinnati v. Discovery Network*, for example, the Court struck down an



ordinance restricting the distribution of commercial handbills, while at the same time allowing the distribution of noncommercial handbills. Although the City claimed that the ordinance was necessary for aesthetic purposes, it could not explain how newsracks for noncommercial handbills were more aesthetically pleasing than those containing commercial handbills. Similarly, in *Carey v. Brown*, 447 U.S. 455, 465 (1980), this Court invalidated a statute prohibiting union picketing in residential neighborhoods while permitting other types of picketing in such neighborhoods. Although the State of Illinois had urged that its statute advanced its interest in protecting residential privacy, the Court observed that "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy." *Id.* at 465. *See also R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (government may not limit scope of ban on unprotected fighting words or obscenity to those which express a point of view with which the government disagrees).

The Court has tacitly recognized what it should now make explicit: a tight fit is required between the ends and means of restrictions on the dissemination of truthful commercial information for such restrictions to survive scrutiny under the First Amendment. Although the Court has previously explained the required fit to be a "reasonable" one, *see Fox*, 492 U.S. at 480, a majority of this Court in *44 Liquormart* expressed support for a more rigorous standard. Justice Stevens wrote for four Justices in applying "a more stringent review" than the "reasonable fit" standard, *44 Liquormart*, 517 U.S. at 507, and Justice Thomas called for normal First Amendment scrutiny to be applied in such cases. The importance of requiring a

tight fit between the means and ends of commercial speech restrictions is especially critical as such restrictions are often of an economically protectionist nature, seeking to advance the interests of certain producers at the expense of their competitors and consumers.

It is not uncommon for seemingly benevolent legislation to be rooted in attempts by some private parties to gain personal advantage through the political process at the expense of others. Public choice economists have labeled such behavior "rent-seeking." Buchanan, Tollison & Tullock, *Toward a Theory of a Rent-Seeking Society* (1981) (containing definitive treatment of rent-seeking and its origins and effects upon a democratic society).

In *44 Liquormart*, for example, Rhode Island's ban on the price advertising of liquor was supported by smaller liquor stores seeking to prevent price competition and to protect its position in the market from larger retailers with larger advertising budgets. Enlisting the government to curtail a rival's right to advertise is an extremely effective way of gaining a competitive advantage in the marketplace, but it is an illegitimate use of the state's power. This Court must therefore require a tight fit between the means and ends of commercial speech restrictions to ensure that the coercive power of the state is not hijacked for illegitimate purposes.

In the instant case, the federal government's casino advertising ban cannot pass constitutional muster under either a "tight fit" or a "reasonable fit" standard. The government cannot show how the distinction between private casinos and Indian casinos has any relevance to



its asserted interests in the reduction of compulsive gambling and the protection of the interests of anti-casino states. Accordingly, the federal statute is inconsistent with the First Amendment and may not stand.

## CONCLUSION

As Justice Blackmun recognized in his *Central Hudson* concurring opinion, "the suppression of information concerning the availability and price" of legal goods and services "strikes at the heart of the First Amendment." *Central Hudson*, 447 U.S. at 556. Because the federal government's casino ban restricts the dissemination of truthful commercial information, it should be reviewed under strict scrutiny. The ban is premised on the notion that Americans will be better off if left ignorant and thus runs directly counter to the First Amendment and our nation's glorious tradition of free speech and open inquiry.

For the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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No. 98-387



In The

# Supreme Court of the United States

October Term, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., et al.,

*Petitioners,*

v.

UNITED STATES OF AMERICA, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, AMERICAN CIVIL LIBERTIES UNION, MAGAZINE PUBLISHERS OF AMERICA, INC., THE MEDIA INSTITUTE, NATIONAL NEWSPAPER ASSOCIATION, NEWSPAPER ASSOCIATION OF AMERICA, and OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST

*Amici Curiae* are broadcasters, publishers, advertisers, and citizens with a deep commitment to the values of free speech.[1] America's media are the conduit through which a significant amount of commercial information is conveyed to the public. Advertising, as this Court repeatedly has recognized, is itself a valuable form of speech. Furthermore, advertising revenues provide the fundamental financial support for the media's ability to gather and report the news, comment on political and other public events, and disseminate other forms of speech universally recognized as vital to a fully-informed public and the proper functioning of our democratic form of government.

*Amici*, first and foremost, support full protection under the First Amendment to the United States Constitution for the marketplace of ideas in which citizens receive information and make informed decisions. Broadcasters, publishers, and advertisers are active participants in that marketplace as speakers, as the means by which other speakers may be heard, and as the vehicle for educating citizens to participate effectively in public and private decisionmaking. *Amici* support protection for commercial speech as an important part of the marketplace of ideas, providing an unimpeded flow of truthful, nonmisleading speech about lawful products. The media are a major link between speakers (including advertisers and the businesses they represent) and their audience (consumers), and the First Amendment was intended to foster the interests of both.[2] *Amici*, therefore, support First Amendment

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support. Individual *amici* are described in the Appendix to this brief.

[2] "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,

protection of truthful and nonmisleading commercial speech concerning lawful products, services, and activities, including gambling. The ability of advertisers to disclose and consumers to receive information about such activities is instrumental to making fully informed decisions. Governmental restrictions on the public availability of that information, such as the advertising ban at issue in this case, undermine not only the market for a particular product or service but also the discussion about public policy issues concerning that product or service.

The continuing efforts of government at all levels – federal, state, and local – to advance social policy goals by suppressing speech and keeping citizens in ignorance demand constant vigilance, not only from the courts but from those individuals and organizations, like *Amici*, who inform and educate the public and monitor First Amendment protections. Restrictions on truthful and nonmisleading advertising of lawful gambling activities are directly contrary to the theory of unfettered access to information on which our society is based. *Amici* urge the Court to provide unambiguous, prescriptive guidance to both the lower courts and governmental entities that will effectively prohibit the Government's paternalistic efforts to use public ignorance as a means of influencing citizens' thoughts and behavior.

## SUMMARY OF ARGUMENT

The vital role of the courts in holding Government to its First Amendment burden of proof in defending commercial speech regulations is a central theme of the Court's commercial speech cases. Under the *Central Hudson* test, particularly as it has been enhanced in recent cases, the Government not only must prove that its purposes in restricting commercial speech are legitimate and substantial, but that the restriction

757 (1976). A consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.



directly and materially advances those purposes and is narrowly tailored to be no more extensive than necessary to achieve the Government's goals, considering alternative regulations with no, or less, impact on speech. The Fifth Circuit in this case has attempted to avoid this searching inquiry in an effort to uphold restrictions on what some consider to be "undesirable" communications. As explained more fully below, this and similar cases demonstrate the need for this Court to once again admonish the lower courts that the First Amendment embraces just such speech.

The need to so instruct lower courts unfortunately has heightened, rather than abated, in the wake of the Court's most recent commercial speech decision, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). While the result was unanimous and the Justices' separate opinions confirmed the Court's continued commitment to enhancing such protection, many lower courts are failing to heed the Court's direction, distinguishing the Court's most recent decisions and selectively citing segments of earlier opinions to support a diluted constitutional analysis. Here, for example, the Court expressly directed the Fifth Circuit to reconsider its decision in light of *44 Liquormart*, yet the court of appeals reaffirmed that decision, refusing to draw any significant guidance from *44 Liquormart*.[3] Adequate First Amendment protection for

[3] The Fifth Circuit majority opined that "after *44 Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear," 149 F.3d at 337. The court continued to rely on discredited portions of this Court's earlier commercial speech jurisprudence to reaffirm its prior decision, claiming that "*44 Liquormart* does not undercut this reasoning." *Id.* at 340. The Fifth Circuit is not alone in failing to adhere to the mode of analysis required after *44 Liquormart*. *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 328-29 (4th Cir. 1996) (on remand for reconsideration in light of *44 Liquormart*, reaffirming decision upholding outdoor advertising ban by purporting to distinguish *44 Liquormart* as limited to "narrowest" proposition "that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any

commercial speech remains in jeopardy as long as the lower courts feel free to take two steps back rather than follow this Court's most recent steps forward.

The Government has a limited, if any, interest in banning advertising of private casinos. States, rather than the federal government, regulate gambling activities, and the vast majority of them permit, and in many cases promote, such activities. Moreover, the federal government has taken no steps to discourage, and in fact encourages, Indian Tribal gaming. The Government's nationwide attempt to keep the public in selective ignorance is unrelated to any "commercial harms" of market fraud and overreaching and is inconsistent with the very "federalism" interest it earlier asserted in support of an identical advertising ban. Nor can the Government assert a substantial interest in protecting the most vulnerable potential

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legitimate end"), *cert. denied*, 117 S. Ct. 1569 (1997); *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 101 F. 3d 332 (4th Cir. 1996) (companion case), *cert. denied*, 117 S. Ct. 1569 (1997); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1225, 1228 (W.D. Wash. 1998) (questioning *44 Liquormart* because "no rationale was able to garner a majority"); *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137 (N.J. 1998) (purporting to distinguish *44 Liquormart* as applicable only to total speech bans, and holding "the government does not have a heavy burden to satisfy" second prong of *Central Hudson* test). Even some courts that have protected commercial speech have minimized the value of *44 Liquormart* and applied a less vigorous analysis than required by this Court. *See, e.g., Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1332 (9th Cir. 1997) (striking down ban on casino gambling advertising, but deferring to presumption – discredited in *44 Liquormart* – that government's interest in discouraging public participation in gambling is substantial enough to satisfy *Central Hudson*), *cert. denied*, 118 S. Ct. 1050 (1998); *Nordyke v. County of Santa Clara*, 933 F. Supp. 903 (N.D. Cal. 1996) (enjoining restriction, but finding *44 Liquormart* did not preclude reliance on presumptions that speech restriction furthered government interest), *aff'd*, 110 F.3d 707 (9th Cir. 1997); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 422-23 (D. Vt. 1998) (enjoining advertising restrictions but finding *44 Liquormart* gave "no clear statement of the test to apply . . . .").



recipients at the expense of the public as a whole. Government must *prove* that the harms it purports to address through commercial speech restrictions are legitimate and real. It has not done so in this case.

The Government also cannot *prove* that its advertising ban directly advances any arguably substantial interest to a material degree, particularly in light of the internal inconsistencies of the statute at issue in this case. Indeed, the Government failed to produce *any* evidence of direct and material advancement. Yet the Fifth Circuit majority relied on a conclusive presumption that advertising increases consumption to conclude that the Government satisfied this *Central Hudson* factor. This Court has rejected the concept of such an evidence-precluding presumption. The Fifth Circuit majority attempts to evade the Court's latest commercial speech cases in an effort to return to the days when the Government could ban such speech based on nothing more than a moral disagreement with its subject matter. The Court needs to reaffirm expressly that the Government cannot be relieved of its burden of proof through judicial deference to presumptions or legislative decisionmaking, and to instruct the lower courts that such deference would nullify the third *Central Hudson* factor.

Finally, the Government failed to produce any evidence to *prove* that its advertising ban is narrowly tailored to the asserted governmental interests. Numerous obvious alternatives exist to banning speech about gambling – including Government-sponsored counter-speech and regulation enforcement efforts – and Congress has established a commission to study and recommend just such alternatives. The Fifth Circuit majority, however, dismissed out of hand even the possibility that any alternatives could be effective and characterized the ban as a reasonable time, place, and manner restriction. This Court has soundly rejected such reasoning, requiring proof that alternatives to speech restrictions would be ineffective and requiring that a valid time, place, or manner restriction on speech be unrelated to the content of that

speech. The statute at issue here, which bans private casino advertising solely because of its content, is directly at odds with these requirements.

The Court has applied its *Central Hudson* analysis with increasing vigor in recent cases, yet the Fifth Circuit majority opinion amounts to a massive retreat to a time when Congress and State legislatures could curtail commercial speech with virtual impunity. The Court should refuse such an invitation to eviscerate First Amendment protection for commercial speech. Judicial deference to legislatures on matters of constitutional permissibility is fundamentally inconsistent with the intent of the Framers and the decisions of this Court. *Amici* urge the Court once again to reaffirm its commitment to strong protection for truthful, nonmisleading commercial speech about legal products and services, and expressly to require that Government be held to its burden to prove the constitutionality of any restrictions on such speech. The Fifth Circuit majority failed to do so here, and its decision should be reversed.

## ARGUMENT

### I. THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH.

This Court has repeatedly stressed the value and significance of commercial speech since specifically extending First Amendment protection to such speech in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As the Court has observed, commercial speech is worthy of protection for many of the same reasons that other forms of speech are protected:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.



*Id.* at 765 (citations omitted).

Since that first recognition of the importance of commercial speech protection, the Court has continued to observe that "[t]he commercial marketplace, like spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).[4]

> [T]he Court, and individual members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

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[4] *Accord, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-21 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980).

*44 Liquormart*, 116 S. Ct. at 1517 (Thomas, J., concurring in judgment) (citations and footnote omitted).[5]

To ensure proper protection for these First Amendment objectives, therefore, the Court has carefully scrutinized Government regulation of commercial speech and has required that Government bear substantial factual burdens to justify all such regulation. *E.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-91 (1995); *Edenfield*, 507 U.S. at 767. Such scrutiny is no less demanding for speech that concerns so-called "socially harmful" or "vice" activities, including the advertising of lawful gambling activities now at issue before the Court in this case. The Court has unequivocally stated that nothing in its prior case law "compels us to craft an exception to the *Central Hudson* standard" for such speech. *Rubin v. Coors Brewing*, 514 U.S. at 482 n.2. Justice Stevens reiterated this conclusion in *44 Liquormart* and explained that "[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity,' " and that "recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice." 517 U.S. at 514 (Stevens, J., plurality op.).

The Fifth Circuit majority in this case did not expressly disavow this Court's rejection of a "vice" exception to First Amendment protection for commercial speech, but plainly tailored its analysis to the nature of the activity the restricted speech concerns. The lower court openly expressed concern

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[5] Justice Thomas also observed that the Court infrequently has departed from strict application of these principles, *id.*, but has done so recently only in instances in which the government's interest was ensuring consumer protection from fraud and other forms of overreaching, rather than indirect regulation of the underlying activity. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).



that striking down the Government's commercial speech ban would subject citizens "to the influence of broadcast advertising for privately owned casinos" and "effectively awards federal sanction to an activity that is again coming to be viewed with moral and utilitarian suspicion." 149 F.3d at 340-41. The lower federal courts are not the nation's arbiters of morality, nor has this Court ever conditioned protection for the exercise of private citizens' free speech rights on whether the Government would be perceived as endorsing the subject matter of that speech. Analysis of commercial speech restrictions under the First Amendment is not a moral litmus test but a process in which the Government must prove that its restrictions are permissible, not merely rely on the assertion that the absence of such restraints would confer governmental approval of a controversial activity.

Truthful, nonmisleading commercial speech about a legal product or service is a valuable component in the marketplace of ideas, regardless of whether a segment of the population disapproves of that product or service. Indeed, commercial speech concerning a controversial product or service may be particularly valuable as a source of information or spark for public discussion about that product or service. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (abortion "advertisement conveyed information of potential interest and value to a diverse audience – not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter"). This Court's decisions prevent the Government from resorting to speech restrictions as the first method for attempting to achieve its goals. The Government accordingly bears the burden to prove that its ban on advertising for private casino gambling permissibly restricts commercial speech – a burden the Government has not carried.

## II. THE GOVERNMENT HAS NOT IDENTIFIED A SUBSTANTIAL INTEREST THAT WOULD JUSTIFY RESTRICTIONS ON TRUTHFUL COMMERCIAL SPEECH ABOUT GAMBLING.

The Government does not maintain that commercial speech prohibited under its advertising ban concerns an illegal product or service or is inherently false or misleading. Because this initial factor of the Court's *Central Hudson* analysis is not at issue, therefore, the Government must prove that (2) a real and substantial interest underlies the Government's restriction on speech; (3) the restriction directly advances the Government's interest in a material way; and (4) the restriction is no more extensive than necessary to achieve that interest in light of available alternatives with less impact on speech. *E.g.*, *Rubin v. Coors Brewing*, 514 U.S. at 482. The interests asserted by the Government are unrelated to commercial harms and thus fail to satisfy the second *Central Hudson* requirement. Even if one or more of those interests could justify the casino advertising ban, the Government's asserted interests are questionable at best, and significantly impact the scope of the remaining *Central Hudson* analysis.

The Government has identified three interests that allegedly support its ban on advertising of private casino gambling: (1) discouraging public participation in gambling activity; (2) protecting states in which gambling is illegal; and (3) curbing abuse of gambling by compulsive gamblers. As an initial matter, none of these interests concerns protecting consumers from any "commercial harms" resulting from the advertising itself, as opposed to the legal gambling activities being advertised. These purported State interests represent governmental policy objectives directed to those gambling activities, not to any protection for consumers from overreaching, oppressive, or fraudulent communications.

> It is the State's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an "underlying government policy" that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy.



*44 Liquormart*, 116 S. Ct. at 1508 (Stevens, J., plurality opinion) (quoting *Cincinnati v. Discovery Network*, 507 U.S. at 426 and *Central Hudson*, 447 U.S. at 566, n.9) (citations omitted). The Government, having failed to assert an interest in protecting consumers from commercial harms from casino advertising, has failed to identify any substantial interest that would justify its restrictions on commercial speech.

Even if the assertion of noncommercial interests could hypothetically satisfy the second *Central Hudson* factor, the Government's asserted interests in this case are questionable at best and thus are entitled to minimal, if any, weight on the *Central Hudson* scales. The Court has cautioned that it "must identify with care the interests the State itself asserts. Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 507 U.S. at 768 (citations omitted). The Government bears the burden to prove that the concerns "it recites are real." *Id.* at 771. The Government has not met its burden here.

The Government first asserts that it has a substantial interest in reducing overall public participation in gambling activities. Congress, however, effectively has left regulation of such activities to the States. States and local governments, in turn, have increasingly authorized, and sponsor, gambling activities.[6] These State and local governments have balanced

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[6] Thirty-seven states and the District of Columbia engage in state-sponsored lotteries, and private casinos and gambling activities are

the benefits and possible harms and concluded that permitting their citizens to participate in such activities is in the public interest. Most of these States also directly encourage public participation in State-sponsored lotteries and other gaming. In addition, Indian Tribal gaming, enabled by federal law, has become widespread in the past decade.[7] Under such circumstances, the Federal Government cannot legitimately claim an overriding interest in discouraging public participation in the very activities it has left to the States and Indian Tribes the authority to permit and promote. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 354 (1986) (Brennan, J., dissenting).[8]

The Government has also asserted that it must protect the interests of nongambling States in discouraging gambling activities by their citizens. Such an interest in imposing the public policy of some States onto others stands in sharp contrast to the "federalism" interest the Government previously asserted to justify the same statute.[9] *See United States v.*

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authorized in an increasing number of States. *See Lotteries*, Staff Report of National Gambling Impact Study Commission, *available at* <http://www.ngisc.gov/research/lotteries.html.>

[7] *See* 25 U.S.C. § 2701 *et seq.* As of December 31, 1996, 184 Indian Tribal Governments operated casinos and other forms of gambling in 24 States. *Native American Gaming*, Staff Report of National Gambling Impact Study Commission, *available at* <http://www.ngisc.gov/research/nagaming.html.>

[8] The majority in *Posadas* accepted Puerto Rico's asserted interest in discouraging its residents from engaging in casino gambling as substantial, but the Court has since disavowed reliance on deference to such unsupported legislative determinations. *See 44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J., plurality op.) ("on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis"); *id.* at 1522 (O'Connor, J., concurring) ("[s]ince *Posadas*, . . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny.").

[9] Viewed somewhat differently, the statutory ban on private casino advertising may operate to the benefit of States and Indian Tribal



*Edge Broadcasting Co.*, 509 U.S. 418, 423 (1993) (government asserted that the statute was intended " 'to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States' ") (quoting S. Rep. No. 93-1404 at 2 (1974)). The statutory scheme, moreover, flatly contradicts the Government's asserted solicitude for nongambling States. The Federal Government has compelled *all* States to accept Indian Tribal gaming, and that gaming, including Indian Tribal casino gambling, may be freely advertised. *See* 25 U.S.C. § 2710; 47 C.F.R. § 73.1211(c)(3) (excluding Indian Tribal gaming from broadcast advertising ban). The Government cannot credibly claim an interest in *protecting* States from public participation in gambling activities while simultaneously *imposing* those very activities on the States.

The Government asserted a third interest at the eleventh hour of this litigation in protecting compulsive gamblers, an interest even the Fifth Circuit majority found to be unsupported and posited too late for judicial consideration. 149 F.3d at 338-39. The Government obviously is attempting to take advantage of scattered lower court decisions evading this Court's requirements by turning away from the First Amendment on this issue and focusing instead on the impact of commercial speech on what are claimed to be the most vulnerable potential recipients.[10] Government, according to these

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Governments that sponsor (and may purchase broadcast advertising to promote) their own gambling activities by precluding their private competitors from advertising on radio and television. The Federal Government has no legitimate interest in favoring State and Indian Tribal Governments over private individuals as sponsors of commercial speech, but in any event the Government has failed to assert any federalism interest that would justify the ban on private casino advertising.

[10] *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 328-29 (4th Cir. 1996) (reaffirming on remand a Baltimore ban on billboard advertising of alcohol beverages because the city "attempts to protect its children in a manner and with a motive distinct from those evidenced by Rhode Island in *44 Liquormart* and in accord with an unbroken chain of Supreme Court cases which indicate its desire to ensure that children do not

courts, may restrict commercial speech as long as it asserts an interest in protecting an "eggshell ear" audience, particularly children. The Fifth Circuit majority, while expressly rejecting the Government's "assertions concerning compulsive gambling, intuitively sensible though some of them are," *id.* at 338, nevertheless concluded that if the statutory ban were not upheld, "communities will be less capable of *insulating themselves and their children* from the deleterious influence of gambling" and that "[d]octrinal rigidity" would preclude "peoples' right to make choices *to protect their community and their children*." *Id.* at 341 (emphasis added).

States unquestionably have an interest in protecting children and preventing abuse of many otherwise lawful products and services, but this Court has never sanctioned "lowest common denominator" protection for speech, much less authorized lower courts to fabricate such a justification for speech restrictions out of whole cloth. To the contrary, the Court has consistently concluded that the Constitution does not permit the Government to tailor speech intended for the general public to the needs or tastes of a fragile few. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) ("the government may not 'reduce the adult population . . . to reading only what is fit for children' ") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Nor may the Government avoid strict application of First Amendment principles to protect the interests of persons who are allegedly more susceptible to misuse of the advertised product or service. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (holding that Government may not bar adults from receiving "indecent" but constitutionally protected speech in an asserted effort to protect children).

Courts too often gloss over the "substantial interest" requirement of this Court's commercial speech analysis – or

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become lost in the marketplace of ideas"), *cert. denied*, 117 S. Ct. 1569 (1997); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998) (finding government had substantial interest in protecting children from profane advertising); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1225 (W.D. Wash. 1998).



worse, use an asserted interest in (or the court's own supposition of) protecting vulnerable potential recipients to trump the remaining *Central Hudson* inquiry. The Court should once again reaffirm that Government or judicial solicitude for the highly susceptible cannot substitute for a genuine and legitimate governmental interest and proof that the harms any commercial speech purports to remedy or prevent are real.

## III. THE GOVERNMENT HAS NOT SATISFIED AND CANNOT SATISFY ITS BURDEN TO PROVE THE CONSTITUTIONAL PERMISSIBILITY OF ITS ADVERTISING BAN.

The Government must prove not only that a substantial government interest underlies its ban on private casino advertising but that the ban directly and materially advances, and is narrowly tailored to further, that interest. The Government has not satisfied and cannot satisfy its burden of proof. Indeed, the Government failed even to present evidence on these issues. The Fifth Circuit's decisions upholding the advertising ban disregarded this Court's rejection of legislative deference, and conclusively presumed that the advertising ban directly and materially advanced, and "reasonably fit," the Government's goal of reducing public participation in gambling activities. The Court, therefore, should unambiguously require that governmental entities prove, through evidence presented and weighed in a court of law, that any restrictions on commercial speech directly advance a legitimate and substantial governmental interest to a material degree and that the restrictions are narrowly tailored to further that interest in light of available alternatives that do not impact speech.

### A. The Government Must Prove That Its Advertising Ban Directly and Materially Advances a Substantial Interest and Cannot Rely on Presumptions to Satisfy Its Burden of Proof.

The Court has made it abundantly clear with respect to the third *Central Hudson* factor that the State bears the burden to *prove* – through evidence, as opposed to presumptions, speculation, or conjecture – that any restrictions on commercial speech directly advance a substantial governmental interest in a material way.

> [T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

*Rubin v. Coors Brewing*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 770-71); *accord Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 143 (1994). "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 507 U.S. at 771; *Rubin*, 514 U.S. at 487; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Despite this Court's repeated admonition to hold the Government to its burden of proof, the Fifth Circuit majority found that the Government satisfied the third *Central Hudson* factor entirely on the basis of presumptions, without any evidentiary showing that the advertising ban directly and materially advanced the Government's asserted interests. The majority initially concluded, "It is axiomatic that the purpose and effect of advertising is to increase consumer demand. As noted in both *Posadas* and *Edge*, the vigor with which the



statute has been challenged confirms the efficacy of the prohibition." 69 F.3d at 1301. On remand for reconsideration in light of *44 Liquormart* and the Court's abandonment of the constitutional analysis in *Posadas*, the majority continued to adhere to this view "for the reasons stated in our previous opinion." 149 F.3d at 338.[11] Rather than requiring proof through evidence, the Fifth Circuit simply adopted the conclusive presumptions that advertising always increases consumption and that by challenging an advertising ban, plaintiffs concede that it advances a governmental interest in reducing consumption. Such presumptions are antithetical to this Court's commercial speech jurisprudence and would eviscerate protection for such speech.

The genesis of these presumptions is in *Central Hudson* itself, in which the Court found "an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order." 447 U.S. at 569. Central Hudson, however, was a monopoly provider of electricity seeking to engage in promotional advertising, *i.e.*, "advertising intended to stimulate the purchase of utility services." *Id.* at 559. By definition there was a plausible connection between such advertising and the consumption of electricity: Only one source existed for such electricity, and thus any increase in Central Hudson's sales necessarily would increase overall consumption.

This case-specific concept, however, lost its moorings in *Posadas*, in which the Court deferred to an unstated and unsupported legislative belief that

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[11] The majority also reiterated its beliefs that "the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it," *id.*, and "regulation of promotional advertising directly influences consumer demand, as compared with the indirect market effect criticized in *44 Liquormart*." *Id.* at 340.

> advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

478 U.S. at 342 (citing *Central Hudson*, 447 U.S. at 569); *accord Edge Broadcasting*, 509 U.S. at 434. Suddenly and without analysis, the link between advertising and overall consumption in a *monopoly* market became applicable to advertising in a *competitive* market, and a litigant's right to advertise in order to preserve or increase its market *share* was equated to a desire to increase consumption in the market as a *whole*. Moreover, it was regarded, without proof, as always producing that effect.

Such an assumption ignores the realities of the commercial marketplace, where advertising serves a multitude of purposes and market participants often will advertise their products or services to obtain business at the expense of competitors, not necessarily to stimulate any additional consumer demand.[12] Nor does any association between advertising and consumption, even if proven, establish that the *harms* the Government must prove will necessarily diminish as a direct result of a decrease in commercial speech. Here, for example, a proper application of the *Central Hudson* test requires the Government to prove not just that a ban on

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[12] For example, advertising in support of political candidates (although "political," as opposed to "commercial" speech) has steadily increased, yet voter turn-out continues to decline. *See, e.g.*, Will Lester, Associated Press, *Nationwide Voter Turnout in '98 Election Was Lowest in 54 Years*, The Seattle Times, Feb. 10, 1999 (observing that turnout was low in several notably expensive races). Politicians and their supporters nevertheless continue to spend significant sums on advertising – and to fight vigorously for the right to do so – even though such advertising does not result in greater overall voter participation because the objective is to obtain more votes for them than for their opponents.



advertising private casinos reduces public participation in gambling activities but that this reduction, in turn, substantially remedies any social ills that the Government proves are directly tied to such public participation.

The Court in its most recent opinions has begun to recognize these realities and, in addition to disowning the legislative deference accepted in *Posadas* and *Edge Broadcasting*, has required proof of any asserted connection between advertising, consumption, and the Government-asserted harms. *See 44 Liquormart*, 517 U.S. at 505-06 (Stevens, J., plurality op.) (concluding that while a ban on price advertising for alcohol beverages "may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption"); *Rubin*, 514 U.S. at 487-88 (the " 'common sense' " idea that "a restriction on the advertising of a product characteristic will decrease the extent to which consumers will select a product on the basis of that trait" held insufficient to prove direct and material advancement of the asserted Government interest).

While this Court has thus cabined *Posadas* and *Edge Broadcasting*, the Fifth Circuit and many other courts have continued to accept presumptions that preclude compilation and judicial review of the evidentiary record this Court has demanded.[13] The Government in this case introduced *no evidence* to demonstrate that banning advertising would have any impact on public participation in gambling activities, yet the Fifth Circuit majority conclusively presumed such an impact. Such a presumption flies in the face of this Court's recent

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[13] *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *reaff'd*, 101 F.3d 325 (4th Cir. 1996) (concluding *no judicial factual findings* are required on *any* aspect of *Central Hudson* test, and that courts may uphold restrictions on commercial speech based solely on presumptions and materials gathered during legislative process), *cert. denied*, 117 S. Ct. 1569 (1997).

commercial speech decisions, which have flatly rejected legislative deference, necessarily precluding indirect deference to legislative judgments through the improper use of conclusive presumptions.[14] Practically speaking, judicial invocation of such presumptions eliminates the third *Central Hudson* factor altogether because the fact that anyone challenged a restriction on commercial speech would conclusively demonstrate that the restriction is effective. Acceptance of the Fifth Circuit majority's analysis would allow the Government to merely posit an evil and then regulate advertising by presuming that the offending conduct is thereby promoted. Having overruled *Posadas* in *Rubin* and *44 Liquormart*, the Court should not allow the lower courts and Government to resurrect it in this fashion. The Court, therefore, should use this opportunity to reaffirm, specifically and expressly, that the Government may not rely on presumptions but must prove, *by evidence presented and weighed in a court of law*, that its commercial speech restriction directly advances a substantial interest in a material way.

The Government has not made the requisite showing here, nor could it, in light of the numerous statutory exceptions to its advertising ban. The statute bans advertising of

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[14] The Fifth Circuit opinion and similar decisions even exceed the bounds of evidentiary presumptions. Such presumptions allocate the burden of producing evidence among the parties and are not themselves evidence of a disputed fact. *See, e.g., Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984) ("Presumptions of fact . . . arise out of considerations of fairness, public policy, and probability, and are useful devices for allocating the burden of production of evidence between the parties."). Contrary to the abuse of this concept by some courts, a proper evidentiary presumption, without more, cannot establish a disputed issue of fact. Even proper application of this principle, however, is inappropriate in the context of the First Amendment. A presumption that requires those who challenge restrictions on commercial speech to first produce evidence of the restriction's ineffectiveness would turn on its head the Court's requirement that the government must bear the burden to prove the permissibility of its commercial speech restrictions.



private casino gambling while permitting such advertising for casino and other gambling activities on Indian reservations, State-sponsored lotteries, and other gaming. 18 U.S.C. §§ 1301-08; 47 C.F.R. § 73.1211. The Government produced no evidence to demonstrate that "compulsive gambling" or other alleged social ills are associated with commercial casinos any more than with Indian, State, or other private gaming operations. Yet, the Government compels States to accommodate Indian Tribal gaming and allows those Tribes, as well as States that sponsor lotteries, to advertise freely. Neither evidence nor logic supports the Government's position that a ban on advertising private casinos will have any impact whatsoever on public participation in gambling activities under these circumstances.

This Court recently concluded in the context of a similar statutory scheme that "[t]here is little chance that [a regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Rubin v. Coors Brewing*, 514 U.S. at 489. The Government's inconsistent ban on gambling advertising, therefore, cannot directly and materially advance any legitimate governmental interest. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1336 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 506-07 (D.N.J. 1997), *cert. denied*, ___ S. Ct. ___, 1999 WL 8447 (Jan. 11, 1999) (No. 98-721) (Third Circuit appeal pending). Accordingly, the Court should reverse the Fifth Circuit's decision and strike down the ban on advertising by private casinos as fatally inconsistent with the First Amendment.

### B. The Government Cannot Prove the Challenged Restriction Is Narrowly Tailored to Advance Its Substantial Interest, and May Not Selectively Ban Forms of Commercial Speech to Accomplish Its Asserted Goals.

The fourth *Central Hudson* factor requires that the Government prove that its restriction on speech is no more extensive than necessary to serve its asserted substantial interest. *E.g.*, *Rubin v. Coors Brewing*, 514 U.S. at 490-91. The Court reaffirmed in *44 Liquormart* that the Government must be put to its proof to demonstrate narrow tailoring between its means and its ends. As Justice O'Connor stated in that case on behalf of four Justices,

> While the State need not employ the least restrictive means to accomplish its goal, the fit between means and end must be "narrowly tailored." The scope of the restriction on speech must be reasonably, though it need not be perfectly, targeted to address the harm intended to be regulated. The State's regulation must indicate a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

517 U.S. at 529 (citations omitted); *see id.* at 508-11 (Stevens, J., plurality op.); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

The Fifth Circuit majority purported to recognize that in the wake of *44 Liquormart*, the fourth *Central Hudson* factor "has become a tougher standard for the state to satisfy." 149 F.3d at 338. It failed, however, to apply this "tougher standard" in any meaningful way. Instead, the lower court majority attempted to make a constitutional silk purse out of a



sow's ear, citing the gambling advertising ban's fragmented statutory scheme as evidence of a "reasonable fit":

> The federal government's policy toward legalized gambling is consciously ambivalent. What began as a prohibition on all interstate lottery advertising has been successively, but gingerly modified to respect varying state policies and the federal government's encouragement of Indian commercial gambling. The remaining advertising limits reflect congressional recognition that gambling has historically been considered a vice; that it may be an addictive activity; that the consequences of compulsive gambling addiction affect children, the family, and society; and that organized crime is often involved in legalized gambling.

*Id.* at 339 (footnotes omitted). No longer able to rely expressly on *Posadas*, the majority then turned to *Edge Broadcasting* to reaffirm its prior decision, drawing the "inference" from the Court's opinion in that case that "if the federal government may pursue a cautious policy toward the promotion of commercial gambling, then it may use one means at its disposal – a restriction on broadcast advertising – to control demand for the activity." *Id.* at 340 (footnote omitted).

Nothing in this Court's opinion in *Edge Broadcasting* supports the Fifth Circuit's "inference" that the Government may selectively ban commercial speech sponsored by private casinos while permitting the same commercial speech sponsored by Indian Tribal casinos and State-sponsored lotteries. The Court in *Edge Broadcasting* held only that a restriction on lottery advertising by broadcasters located in nonlottery States "reasonably fit" the Government's interest in both respecting the policy of such States and accommodating the interests of lottery States, even in circumstances in which the bulk of the broadcaster's audience is in a lottery State.[15] 509

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[15] Though *Amici* believe *Edge Broadcasting* was wrongly decided and that an express repudiation of its analysis would help guide lower

U.S. at 429-30. Indeed, apart from that bare conclusion, the Court in *Edge Broadcasting* engaged in no analysis of the fourth *Central Hudson* factor, and instead focused entirely on the third factor of direct advancement. *See id.* (restating its fourth factor conclusion that "applying the restriction to a broadcaster such as Edge *directly advances* the governmental interest").

This Court now requires a "closer look," *44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring), than the analysis in which it engaged in *Edge Broadcasting*. The Court has disowned the deference to the "incremental" or selective advancement of governmental objectives through speech restrictions on which it relied in both *Posadas* and *Edge Broadcasting*. As Justice Stevens explained,

> Given our longstanding hostility to commercial speech regulation of this type, Posadas clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The Posadas majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available.

*44 Liquormart*, 517 U.S. at 509-10 (Stevens, J., plurality op.); *accord id.* at 1522 (O'Connor, J., concurring). Although specific to *Posadas*, the Justices' rejection of that line of reasoning also should preclude any reliance on *Edge Broadcasting*

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courts in properly evaluating commercial speech restrictions in the future, this Court certainly could reverse the Fifth Circuit in this case without overruling *Edge Broadcasting*. As Justice Stevens, writing for four Justices, recognized in *44 Liquormart*, the holding in *Edge Broadcasting* affected only "advertising about an activity that had been deemed *illegal* in the jurisdiction in which the broadcaster was located." 517 U.S. at 509 (emphasis added). This case is distinguishable: The issue is whether broadcasters may advertise an activity that is *legal* in the jurisdiction where they are located.



for the discredited proposition that courts may defer to Congressional judgments on how best to accomplish governmental ends, rather than insisting that the Government prove that no reasonable non-speech related alternatives exist to banning speech. Here, on the other hand, the Government chose speech restrictions as its first, and only, regulatory alternative.

The Fifth Circuit majority also refused to consider the "availability of less burdensome alternatives to reach the stated goal," which the Court has reaffirmed is a critical aspect of the *Central Hudson* analysis. *44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring); *id.* at 508-11 (Stevens, J., plurality op.). The lower court concluded that "the efficacy of non-advertising-related means of discouraging casino gambling is purely hypothetical, as such measures would have to compete with the message of social approbation that would simultaneously be conveyed by unbridled broadcast advertising." 149 F.3d at 340. The Fifth Circuit thus not only relieved the Government entirely of its burden to prove that a ban on speech is narrowly tailored to its asserted interests, but dismissed out of hand even the *possibility* that alternatives might be effective, on the very strange hypothesis that by not banning advertising sponsored by the private casino owners, the Government would be perceived as endorsing it. Such a concept is nothing less than extraordinary and would eviscerate the fourth *Central Hudson* factor for commercial speech about any activity the Government does not favor.

Congress has obvious other methods at its disposal that would more directly accomplish an interest in reducing demand for gambling activities in States where all such activities are illegal. Most obviously, the Government could sponsor its own speech to warn or educate the public on the social ills the Government believes arise from excessive gambling. Congress also could provide funding for State efforts to enforce non-speech-related regulations on gambling activities and the alleged social harms associated with such activities, as well as enact and enforce its own regulations consistent with its Commerce Clause authority. Indeed, Congress has

established a commission to study and recommend just such alternatives. *See* National Gambling Impact Study Commission Act, Pub. L. No. 104-169 (1996). "The ready availability of such alternatives . . . demonstrates that the fit between ends and means is not narrowly tailored." *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring).[16]

Finally, the Fifth Circuit majority vainly attempts to distinguish the analysis in *44 Liquormart* by stating that the government's restriction on gambling advertising, unlike the alcohol beverage price restriction at issue in *44 Liquormart*, is not a "blanket ban on advertising" and thus is "more analogous to a time, place and manner restriction. Other media remain available, such as newspapers, magazines and billboards, and indeed broadcast advertising of casinos, without reference to gambling, is permitted." 149 F.3d at 340. The Fifth Circuit majority mischaracterizes the plain language of the statute, which effectively bans *all* private casino gambling advertising in any medium, including "[a]ny newspaper, circular, pamphlet, or publication of any kind." 18 U.S.C. § 1302. More fundamentally, this Court has flatly rejected the Fifth Circuit majority's rationale, which is irreconcilable with both the Court's commercial speech jurisprudence and the constitutional analysis of time, place, and manner restrictions on other forms of protected speech.

"[T]he essence of time, place, or manner restrictions lies in the recognition that various methods of speech, *regardless of their content*, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares

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[16] *Accord Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 506-07 (D.N.J. 1997), *cert. denied*, ___ S. Ct. ___, 1999 WL 8447 (Jan. 11, 1999) (No. 98-721) (Third Circuit appeal pending). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (availability of options indicates restriction is more extensive than necessary); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (failure to consider alternative methods of furthering interests shows government did not "carefully calculate" burden on speech, and is evidence the "fit" between ends and means is not reasonable) (1993); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).



at 2 a.m. disturbs neighborhood tranquility." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (emphasis added). Such restrictions thus must be content neutral, *i.e.*, "not based upon either the content or subject matter" of the regulated speech. *Id.* Restrictions on commercial speech, in sharp contrast, are by definition government regulation based on the content and subject matter of the speech. The Court, therefore, has consistently refused to uphold bans on commercial speech as reasonable time, place, and manner restrictions. In *Discovery Network*, the Court struck down a city ban on newsracks containing commercial publications despite the Government's claim that its interest in safety and esthetics was unrelated to the content of the publications and the publishers had alternative means of distributing their publications.

> The argument is unpersuasive because the very basis for the regulation is the difference between ordinary newspapers and commercial speech. . . . Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."

507 U.S. at 429. The Court concluded that the ban was neither content neutral nor narrowly tailored, and "[t]hus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech." *Id.* at 430; *accord Edenfield*, 507 U.S. at 773; *Virginia Pharmacy*, 425 U.S. at 771. Furthermore, even if the ban on gambling advertising left open reasonable alternative media for expression (which it does not), a restriction on the time, place or manner of speech cannot be justified merely because the Government has not foreclosed all avenues of speech. *See, e.g., Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); *accord Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2348-49 (1997).

The Government's advertising ban specifically targets private casino advertising based on the content of that advertising and is not narrowly tailored to the Government's asserted interests in light of the ready availability of alternative means of pursuing the Government's asserted interests. The Fifth Circuit majority cannot nullify the rigors of this Court's *Central Hudson* requirements by relying on rejected and inapplicable doctrines or by deferring to legislative judgments on how best to accomplish the Government's purported ends. The federal advertising ban on private casino gambling, therefore, cannot survive constitutional scrutiny under a proper application of the Court's *Central Hudson* test and should be declared unconstitutional.

## CONCLUSION

In *44 Liquormart*, this Court made clear – albeit in four separate opinions – that the full measure of First Amendment protection afforded to commercial speech cannot be diluted by evidentiary presumptions, by deference to unproven legislative or judicial beliefs, or by unsubstantiated assertions that censorship is necessary to protect a vulnerable audience. The Court's recent cases instruct that the Government is required to prove – with hard evidence, not with slogans about the alleged harm caused by advertising – that a speech restriction directly and materially advances a substantial interest, and is narrowly tailored to serve that interest. The Fifth Circuit failed to put the Government to its proof, upholding a complete ban on advertising about a lawful activity using an analysis that mimics *Posadas* and other discredited approaches to commercial speech. The Fifth Circuit also ignored the internal inconsistencies of the statutory scheme at issue here – inconsistencies which would be fatal to the Government's effort to justify the advertising ban even if it had some evidence to support its assertions that the ban in fact directly advanced some substantial interest. The opinion below, and other similar opinions cited in this brief, show that lower courts have resisted protecting commercial speech from Government interference to the full extent required by this



Court. *Amici* respectfully request that this Court reverse the judgment below, and do so in a manner that unequivocally instructs the lower courts on the stringent First Amendment standard that must be applied to commercial speech restrictions.

Respectfully submitted.

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## APPENDIX

## IDENTITY OF INDIVIDUAL *AMICI CURIAE*

*American Association of Advertising Agencies* ("AAAA"), founded in 1917, is the trade association for the advertising agency business. Its membership is comprised of over 550 advertising and communications agencies with over 1300 offices throughout the United States. AAAA members create and place over 75 percent of all national advertising and the majority of local and regional advertising in all 50 states. More than 150 AAAA members have clients in the gaming and related industries, with accounts representing state lotteries, pari-mutual betting, casinos, and Native American gaming activities. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with all efforts to restrict commercial speech.

*American Civil Liberties Union* ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae, in cases challenging governmental actions that threaten First Amendment rights. The ACLU and its members have a vital interest in the outcome of this case because it raises fundamental questions about whether, and to what extent, the First Amendment permits government to suppress truthful

and non-misleading information about lawful products and services.

*Magazine Publishers of America, Inc.* ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 1,200 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment right to engage in truthful commercial speech about lawful products and services.

*The Media Institute* (the "Institute") is an independent, nonprofit research organization that advocates a strong First Amendment and full constitutional protection for commercial speech. The Institute has participated in select cases in federal district and circuit courts and the U.S. Supreme Court. The Institute also conducts research and produces publications relating to the First Amendment and other aspects of communications policy, including the annual *The First Amendment and the Media* and the quarterly *Commercial Speech Digest*.

*National Association of Broadcasters* ("NAB"), organized in 1922, is a non-profit incorporated trade organization that serves and represents radio and television stations and networks. NAB's members cover, produce, and broadcast the news and other programming to the



American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities, the activities of government and other matters of public interest and concern.

*National Newspaper Association* ("NNA"), established in 1885, is a not-for-profit trade association representing the owners, publishers and editors of America's community newspapers. NNA's mission is to protect, promote and enhance America's community newspapers. Today, NNA's 4,000 members make it the largest newspaper association in the United States. NNA works closely with policy officials to create a legal and regulatory environment conducive to the growth of community newspapers, including full First Amendment protection for non-misleading, truthful advertising of products and services.

*Newspaper Association of America* ("NAA") is a non-profit organization representing the interests of more than 1,700 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately 87 percent of the U.S. daily newspaper circulation. One of NAA's key strategic priorities is to advance newspapers' interests in First Amendment issues, including the ability to publish information about lawful products and services.

*Outdoor Advertising Association of America, Inc.* ("OAAA"), founded in 1881, is the principal trade association for the outdoor advertising industry. The outdoor advertising industry has disseminated advertisements that are the subject of this lawsuit, and anticipates doing

so in the future. OAAA's 800 members consist of domestic and international outdoor and out-of-home operators, suppliers and advertisers.

(12)



No. 98-387

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

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GREATER NEW ORLEANS BROADCASTING ASSN., *et al.*,
*Petitioners,*

v.

UNITED STATES, *et al.*,
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN SUPPORT OF PETITIONERS

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## BRIEF OF AMICI CURIAE VALLEY BROADCASTING COMPANY AND SIERRA BROADCASTING COMPANY IN SUPPORT OF PETITIONERS

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### STATEMENT OF INTEREST

Amici Curiae Valley Broadcasting Company (Valley) and Sierra Broadcasting Company (Sierra)[1] are broadcasters who are the licensees of television stations KVBC-TV, Las Vegas, Nevada, and KRNV-TV, Reno, Nevada, respectively, and were the plaintiffs in the case of *Valley Broadcasting Company v. United States,* 107 F.3d 1328

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[1] This brief was authored by counsel for *amici curiae* and no person or entity other than *amici curiae* made a monetary contribution to the preparation and submission of this brief. The brief is filed with consent of the parties, and copies of the consent letters have been filed with the Clerk.

(9th Cir. 1997), cert. denied, 118 Sup. Ct. 1050 (1998). In *Valley* the Ninth Circuit held that 18 U.S.C. Sec. 1304, as amended, which prohibits the broadcast of advertising for commercial casino gambling, violates the First Amendment. The *Valley* decision is in conflict with this case where the Fifth Circuit considered the same question and reached a contrary result, upholding the constitutionality of 18 U.S.C. Sec. 1304, as amended, and holding that the Government may prohibit the broadcast of advertising for commercial casino gambling. Since effectively *Valley* will be overturned if this Court upholds the Fifth Circuit in this case, Amici Curiae are interested parties.

## SUMMARY OF ARGUMENT

### A. The *Central Hudson* Test

This commercial speech case turns on the third part of the test stated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980), which is whether the government restriction on otherwise protected speech directly advances the governmental interest asserted. To justify its prohibition on the broadcast of advertising of only state licensed casino gambling in 18 U.S.C. 1304, as amended, the Government asserts two interests, reducing public participation in commercial lotteries and assisting states which do not permit casino gambling. However, as this Court found in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the statute cannot directly and materially advance its asserted interests because of the overall irrationality of the Government's regulatory scheme.

The statutory scheme cannot *reduce* public participation in commercial lotteries because it has been changed from a complete ban on broadcast advertising of all commercial lotteries to a ban which now applies only to state licensed casino gambling. As was pointed out in *Valley Broadcasting Company v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997), cert. denied, 118 Sup.Ct. 1050 (1998), the regulatory scheme now permits many other



types of lotteries to advertise over the airwaves, including state-run lotteries, fishing contests, not-for-profit lotteries, lotteries conducted as promotional activities by commercial organizations, and most significantly, gambling conducted by Indian casinos. As this Court found in *Rubin*, there is little chance that the regulatory scheme can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effect (514 U.S. at 489).

The statutory scheme also cannot directly advance the purpose of assisting states which do not permit casino gambling, because there is no restriction on the carriage by broadcasting stations in such states of advertising for Indian casino gambling, or governmental casino gambling, or non-profit casino gambling in states which permit such activities. Unlike the part of the statute involved in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), there is no restriction of Indian or other permitted casino advertising to broadcast stations licensed to states which permit such gambling. Under the provisions of 18 U.S.C. 1304, as amended, at issue in this case, once a state permits Indian or governmental or non-profit casino gambling within its borders, that gambling can be advertised on broadcasting stations *anywhere*. Thus, for example, under this statutory scheme, an Indian casino in Oklahoma is free to advertise its gambling on radio or television stations in Texas, a state which does not permit casino gambling. How can this advance the interest of the state which does not permit casino gambling? The answer is that it cannot.

As in *Rubin*, the statutory scheme in this case is irrational from the point of view of the governmental purposes supposedly being served. The 5th Circuit in this case attempts to distinguish *Rubin*, which the 9th Circuit in *Valley* cited in support of its decision, but the 5th Circuit never addresses the irrationality of the statutory scheme on which the 9th Circuit relied.

**B. The Statutory Scheme on Its Face Violates the First Amendment.**

The statutory scheme in this case requires broadcasters to discriminate among advertisers solely on the basis of the identity of the speaker of an otherwise acceptable commercial announcement, or the identity of the party on whose behalf the announcement is broadcast. As such, the statutory scheme on its face violates the First Amendment. It is not disputed that ads for state licensed casino gambling concern lawful activity and are not misleading. Since ads for Indian casino gambling and ads for not-for-profit, governmental and occasional and ancillary commercial casino gambling are now permitted to be broadcast over the air, it also cannot be disputed that the casino gambling ads which the state licensed casinos wish to broadcast are themselves acceptable for broadcast. That being the case, there is no basis under the First Amendment for the Government ban on such ads.

Over-the-air casino gambling advertising is either injurious to the public or it is not. It cannot be both injurious and not injurious at the same time. If a broadcaster is permitted to carry a commercial announcement saying "Play our slot machines" over the air on behalf of an Indian casino, it is presumably because that announcement is not injurious to the public. If that is the case, however, how can the same broadcaster's carriage of the same announcement, "Play our slot machines", on behalf of a state licensed casino ten minutes later be injurious to the public? The answer is that it cannot be. The statutory scheme of Sec. 1304, as amended, in which broadcasters are both permitted to and barred from carrying the same commercial announcement, is irrational. Whatever governmental purpose there may be behind this restriction cannot save it, because the selective nature of the restriction is self defeating.

By permitting the audience to receive broadcast announcements about Indian, not-for-profit, governmental



and occasional and ancillary commercial casino gambling, but not permtting the audience to receive broadcast announcements about state licensed casino gambling, the Government is depriving consumers of information concerning casino gambling choices lawfully available to them in the marketplace. That is precisely what the First Amendment prohibits the Government from doing in the area of commercial speech under *Virginia Pharmacy Bd. v. VA. Consumer Council*, 425 U.S. 748 (1976), and the many cases which have applied the principles set out there by this Court.

## ARGUMENT

### I. THE FIFTH CIRCUIT'S APPLICATION OF THE CENTRAL HUDSON TEST IN THIS CASE WAS ERRONEOUS.

The question at issue in this case is whether 18 U.S.C. 1304, as amended by 18 U.S.C. 1307(a)(2) and the Indian Gaming Regulatory Act, 25 U.S.C. 2701, 2720, violates the First Amendment rights of broadcasters when applied by the Government to prohibit the television and radio broadcast of advertising for commercial casino gambling in states which permit such gambling.[2] The Petitioners are broadcasters licensed to operate stations in Louisiana, who seek to carry advertising for legal casinos in Louisiana and Mississippi. The Fifth Circuit twice held that the statutory scheme probiting the broadcast of advertisements for commercial casino gambling is a valid restriction on commercial speech and does not violate the

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[2] 18 U.S.C. Sec. 1304 is set forth in the Appendix to the Petition for writ of Certiorari in this case at page 61a, and 18 U.S.C. Sec. 1307 is set forth at pages 62a-63a. 25 U.S.C. Sec. 2720 states: "Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter." These three statutes are repeated virtually verbatim in 47 C.F.R. 73.1211, which is set forth in the Appendix to the Petition for writ of Certiorari at pages 63a-66a.

First Amendment.[3] Prior to the second 5th Circuit decision the 9th Circuit addressed the same question in *Valley Broadcasting Company v. United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 Sup.Ct. 1050 (1998), and ruled that the statutory scheme does violate the First Amendment. We submit that the 9th Circuit decision in *Valley* is correct and that this Court should reverse the 5th Circuit in this case.

It is undisputed that the advertisements at issue constitute commercial speech, and that accordingly, whether the Government's restriction on speech is permissible under the First Amendment depends upon the application to the case of the four part test set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).[4] The Government does not dispute that the casino gambling in question is legal and that the advertising which the broadcasters wish to carry is truthful, so the first part of the Central Hudson test is not at issue (*See GNOBA I*, 69 F.3d at 1299). The second part of the Central Hudson test is whether the asserted governmental interest is substantial. In this case, as in *Valley*, the Government asserted two interests, discouraging public participation in commercial lotteries and

[3] *Greater New Orleans Broadcasting Ass'n v. U.S.*, 149 F.3d 334 (5th Cir. 1998) (hereinafter "*GNOBA II*"); and an earlier decision, *Greater New Orleans Broadcasting Ass'n v. U.S.*, 69 F.3d 1296 (5th Cir. 1995), *vacated*, 117 S.Ct. 39, 136 L.E.2d 3 (1996), remanded in light of *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (hereinafter "*GNOBA I*").

[4] In *Central Hudson* the test was stated as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted Governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the Governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.* at 566.



assisting states that do not permit casino gambling (*See GNOBA I, 69 F.3d* at 1299). Since both the 5th Circuit below (*See GNOBA I, 69 F.3d* at 1299-1301) and the 9th Circuit in *Valley* (*See* 107 F.3d at 1331-1333), ruled that both governmental interests asserted are substantial, in this amicus curiae brief we shall assume, *arguendo*, that those interests are substantial.

The third part of the Central Hudson test is whether the regulation directly advances the governmental interest asserted. It is here that the 5th and 9th Circuits part company, the 5th Circuit ruling in this case that the regulation of speech directly advances the Governmental interests asserted, while the 9th Circuit ruled in *Valley* that the Government had failed to meet is burden of so proving. We submit that the 9th Circuit has the better of the argument.

### A. The Regulatory Scheme Does Not Directly Advance the Governmental Interests Asserted.

On part 3 of the *Central Hudson* test the 9th Circuit took its guidance from this Court's decision in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), but the 5th Circuit[5] undertook to distinguish *Rubin* and thus to avoid following it. In *Rubin* this Court stated:

> "We conclude that § 205(e)(2) cannot directly and materially advance its asserted interest because the overall irrationality of the Government's regulatory scheme." 514 U.S. at 488.

The same is true with respect to lottery advertising over the air. 18 U.S.C. 1304, as amended, cannot directly and materially advance its asserted interests because of the overall irrationality of the Government's regulatory scheme.

[5] Chief Judge Politz dissented from both of the 5th Circuit decisions below on substantially the grounds which the 9th Circuit relied upon in *Valley*. References to "the 5th Circuit" in this amicus curiae brief are to the majority decision.

**(1) *The regulatory scheme is irrational as regards the interest in reducing public participation in commercial lotteries.***

Over the years, since its adoption in 1934, Sec. 1304 has been amended repeatedly, with each amendment easing the restriction on the broadcast advertising of lotteries. The most recent amendments, in 1988, which led to the filing of the *Valley* case in 1992 and this case in 1994, added 18 U.S.C. Sec. 1307(a)(2) and Sec. 2720 of the Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2720, which authorize the broadcast advertising of lotteries by not-for profit organizations, governmental organizations, commercial organizations when promotional, occasional and ancillary to the primary business of the organization, and by Indian casinos. What has happened is that a statute which constituted a complete ban on all over-the-air commercial lottery advertising for over 50 years, from 1934 until 1988, has been changed to a regulatory scheme in which all forms of commercial lottery advertising, including Indian casino advertising, are now permitted, except for state-licensed casino advertising. The Government contends that this regulatory scheme directly and materially advances a governmental interest in reducing public participation in commercial lotteries, without ever explaining how its exemption of all other forms of commercial lotteries from the ban is not fundamentally contrary to that purpose.

The Government's position is simply irrational. As the 9th Circuit states:

> The government has consistently characterized its primary interest as "discouraging public participation in commercial lotteries, including casino gambling, and thereby minimizing the wide variety of social ills that have historically been associated with these forms of gambling." By the government's own description then, its interest is an extremely broad one—reducing public participation in *all commercial lotteries*. Taking the government's claim at face value, the statutory scheme here would appear to be flawed in the same manner as section 205(e)(2) was in *Coors Brewing*. That is, because section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries. To use the language of *Coors Brewing*, "[t]here is little chance that [the challenged regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Coors Brewing*, 115 S.Ct. at 1593. (*Valley*, 107 F.3d at 1335)



In short, the Government purports to directly and materially reduce public participation in commercial lotteries by permitting the broadcast advertising of such lotteries for the first time, which does not make sense.[6]

Moreover, as the 9th Circuit points out, even if the Government's interest is recast to be merely the reduction of public participation in casino gambling, the Government fares no better. The statutory scheme contains an exception even for casino gambling—casinos operated by Indian Tribes pursuant to the Indian Gaming Regulatory Act are exempt from the provisions of 18 U.S.C. 1304, *Valley*, 107 F.3d 1335-1336. Thus, the regulatory scheme

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[6] In *GNOBA I* (69 F.3d at 1301-1302), on the question whether permitting other forms of media to advertise casino gambling undercuts the governmental purposes of decreasing public demand for gambling, the 5th Circuit quotes this Court's statement in *Edge*:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. (113 S.Ct. at 2707)

It also stands to reason, if the federal regulation increases advertising, as the 1988 amendments do most certainly, that the policy of decreasing demand for gambling is not advanced.

is irrational whether the governmental interest being served is to reduce public participation in commercial lotteries or to reduce public participation in casino gambling.

**(2) *The regulatory scheme is irrational as regards the interest in assisting states which prohibit casino gambling.***

The irrationality of the regulatory scheme with regard to the Government's second governmental interest can be shown by contrasting 18 U.S.C. Sec. 1307(a)(2), the statutory amendment to Sec. 1304 at issue in this case, with 18 U.S.C. Sec. 1307(a)(1), its companion provision which was before this Court in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). Sec. 1307(a)(1), which was at issue in *Edge*, on its face applies to an ad for a lottery "conducted by a state" and "broadcast by a radio or television station licensed to a location in that state or a state which conducts such a lottery" (Sec. 1307(a)(1)(B). On the other hand, Sec. 1307(a)(2), the section of the statute at issue in this case, on its face applies to an ad for a lottery other than a lottery conducted by a state (e.g., a casino game), "that is authorized or not otherwise prohibited by the State in which it is conducted." (Sec. 1307(a)(2)). In Sec. 1307(a)(2), however, *there is no limitation as to the location of broadcasting stations which can carry the ad.* There are additional restrictions addressed to the nature of the entity which may conduct the lottery (casino game), i.e., not-for-profit or governmental organizations, etc., but there is no restriction on the broadcast of such an ad by any radio or television station anywhere.

Thus, for example, under Sec. 1307(a)(2)(A) an ad for the slot machines at Las Vegas' McCarran International Airport, which are conducted by a governmental organization, Clark County, can be carried by radio and television stations in Nevada, which permits casino gambling or by stations in Utah, which does not permit casino



gambling. How does this "assist states which do not permit casino gambling"?

The same is true of ads for Indian casinos. Under the Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2701, et seq., a Tribe is required to obtain Department of the Interior approval of a compact with the state in which it is located before it can operate a casino,[7] but once that is done, under 25 U.S.C. Sec. 2720, the Indian casino is wholly exempt form 18 U.S.C. Sec. 1304 and is free to broadcast ads for its casino games anywhere, in states which permit casinos or in states which prohibit them. Thus, for example, Indian casinos in Louisiana, Oklahoma and New Mexico are free to advertise their gambling on radio and television stations in Texas, although, as the 5th Circuit states (*See GNOBA I* 69 F.3d at 1301), Texas does not permit casino gambling. In *Rubin* this Court said:

> "The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars." (514 U.S. at 488)

To paraphrase *Rubin*, permitting television and radio stations in states which do not permit casino gambling to carry ads for Indian casinos makes no rational sense if the Government's true aim is to assist states which do not permit casino gambling. As the Ninth Circuit states with reference to the exemption for ads for Indian casinos:

> "Such exemption permits Indian Tribes to advertise both in states which allow casino advertising and in those which forbid it. This would appear to undermine the Government's purported interest in protect-

[7] The Department of the Interior's official updated Tribal-State Compact List is available online at http://www.doi.gov/bia/foia/compact/htm. It currently shows 157 Tribes in 24 States with 196 Compacts.

ing non-casino states from the reach of casino advertisements on the airwaves." (*Valley*, 107 F.3d at 1336)

The 9th Circuit's holding that the Government has failed to meet its burden of showing that the restriction on speech in this case directly and materially advances its interests is on strong ground with respect to both interests asserted. As this Court said in *Edenfield v. Fane*, 507 U.S. 761, 769 (1993): "The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." Rather, the Government must demonstrate that "its restrictions will in fact allieviate [the asserted harms] to a material degree.' *Id.*

The 5th Circuit, in its first decision in this case below simply distingished this Court's ruling in *Rubin*, that an irrational regulatory scheme could not directly and materialy advance its governmental interest, on the ground that that situation does not exist here (GNOBA I at 1301). The court does so, however, not by examining the statutory provisions in question from the point of view of the governmental interests alleged, but by relying on broad generalities:

> Congress has singled out particular forms of gaming for which broadcast advertising is permitted, and in so doing made legitimate, quintessentially legislative choices that the social costs of these activities were less than those of casino gambling, or the social benefits, e.g. of staterun lotteries, Indian and charitable gambling, were greater. (Footnote omitted.) *GNOBA I*, 69 F.3d at 1301.

In its second decision the 5th Circuit reaffirmed this holding, stating:

> We remain persuaded, for the reasons stated in our previous opinion, that *Rubin* does not compel the striking down of § 1304. The government may legitimately distinguish among certain kinds of gambling for advertising purposes, determining that



> the social impact of activities such as staterun lotteries, Indian and charitable gambling include social benefits as well as costs and that these other activities often have dramatically different geographic scope. That the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it (Citations omitted). There is also no doubt that the prohibition on broadcast advertising reinforces the policies of states, such as Texas, which do not permit casino gambling. *GNOBA II*, 149 F.3d at 338.

The 5th Circuit simply refuses to see any conflict between a governmental interest in reducing public participation in commercial lotteries and a statutory scheme which for the first time permits the broadcast advertising of many commercial lotteries, or any conflict between a governmental interest in assisting states which do not permit casino gambling and a statutory scheme which permits the broadcast advertising of Indian casino gambling in those states.[8]

As this Court found in *Rubin*, the problem with the Government's restriction on commercial speech in this case is that the regulatory scheme does not make sense from the point of view of the governmental interests purportedly being served. That being so, the restriction cannot directly and materially advance those interests, so it must fail the third part of the *Central Hudson* test. The failure of the 5th Circuit to so find was error.

Having found that 18 U.S.C. 1304, as amended, fails the third part of *Central Hudson*, the 9th Circuit did not reach the fourth part, and Amici will do the same here.

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[8] It should also be noted that this Court stated in *Rubin*: "Nor do we think that respondent's litigating positions can be used against it as proof that the Government's regulation is necessary." 514 U.S. at 490.

## II. THE STATUTORY SCHEME OF DISCRIMINATION BASED SOLELY ON THE IDENTITY OF THE SPEAKER OF AN OTHERWISE ACCEPTABLE COMMERCIAL ANNOUNCEMENT, OR THE IDENTITY OF THE PARTY ON WHOSE BEHALF THE ANNOUNCEMENT IS BROADCAST, ON ITS FACE VIOLATES THE FIRST AMENDMENT.

There is a fundamental problem with 18 U.S.C. 1304, as amended, under the First Amendment, entirely apart from any questions regarding the governmental purposes behind the statute. The problem is that the statutory scheme discriminates solely on the basis of the identity of the speaker of an otherwise acceptable commercial announcement, or the identity of the party of whose behalf the announcement is broadcast. With respect, we submit that even though this is "merely" commercial speech, such discrimination on its face violates the First Amendment.

18 U.S.C. 1304 itself, standing alone, does not present any problem in this regard. While it is Draconian in its criminalizing of broadcast speech, Sec. 1304 treats everyone who falls within its ambit equally: "Whoever broadcasts * * * or * * * knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme" shall be fined or imprisoned, or both. The statute is straightforward: it punishes anyone who broadcasts an advertisement concerning a lottery. It targets the content of the advertisement, the speech. The effect of Sec. 1304 is to ban certain speech, namely advertisements concerning lotteries, from the airwaves.

Sec. 1307(a)(2), however, does not treat everyone who falls within its ambit equally. That section of the statute creates an exception to the ban of Sec 1304 for an advertisement concerning a lottery, other than a state lottery, that is authorized or not otherwise prohibited by the State in which it is conducted, and which is—

> "(A) conducted by a not-for-profit organization or a governmental organization; or



> (B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that orgainzation."

Sec. 1307(a)(2) creates an exception to the restriction on the speech of broadcasters stated in Sec. 1304 not on the basis of what is spoken in the announcement, but on the basis of the type of organization which conducts the lottery, that is, the exception is based on the identity of the party who speaks in the announcement or on whose behalf the announcement is spoken.

Sec. 2720 of the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq., is like Sec. 1307(a)(2) in this regard. It creates an exception to the restriction on the speech of broadcasters contained in Sec. 1304 for any gaming conducted by an Indian tribe under the Act. Again, the exception is based on the identity of the party conducting the gaming, in this case an Indian tribe.

Sec. 1307(a)(2) by its terms discriminates against a class of broadcast advertisements, namely, those concerning lotteries that are authorized or not otherwise prohibited by the state in which they are conducted and which *do not* come within either section (A) or (B). In reality, since there is also an exception for Indian casinos, the only lottery advertisements which come within the class discriminated against, that is, the only lottery advertisements that are not excepted from the ban of Sec. 1304, are ads for state licensed and regulated casinos and casino games.

As indicated above, Sec. 1304 standing alone constitutes a ban on lottery advertising over the air. It is important to note what effect the exceptions set forth in Sec. 1307(b)(2) and the Indian Gaming Regulatory Act have on the ban. The effect is simple: advertisements concerning lotteries are no longer banned from the airwaves, they are now acceptable for broadcast. Broadcasters are now permitted to carry ads concerning lotteries which are con-

ducted by the organizations named in subsections (A) and (B) of Sec. 1307 and Sec. 2720 of the Indian Gaming Regulatory Act.

This raises a practical question regarding the statutory scheme. What basis is left for barring ads for state licensed casinos from the air waves? It is not disputed that these ads concern lawful activity and are not misleading. And now it cannot be disputed that the ads themselves are acceptable for broadcast. What basis is left for a governmental restriction on speech here? What we are left with is a statutory scheme which discriminates against certain ads solely on the basis of the identity of the speaker or the entity on whose behalf the ads are broadcast. Is such discrimination permissible under the First Amendment? We submit that it is not and cannot be.

This case presents the question under the First Amendment whether the Congress can make a law authorizing broadcasters to carry commercial announcements for one group of advertisers and prohibiting them from carrying the same commercial announcements for another group of advertisers, even though it is conceded that the ads for the second group are truthful and about lawful activities. It appears this question is a matter of first impression in the Court.

If the first part of the *Central Hudson* test is met, as it concededly is here, the ads for state licensed casinos are "protected by the First Amendment", *Central Hudson*, 447 U.S. at 566. Assuming, arguendo, that because it is merely commercial speech the Government may have a right to restrict this speech to some extent, the fact remains that it is still speech that is being broadcast over the air to the public, it is about lawful activity, and it is not misleading. The fact that this speech is protected by the First Amendment must mean, at the least, that the Government must have a rational basis for whatever restriction it imposes, and that such restriction must somehow be related to the public good, whether it is called the



public interest, or protecting the public from injury, or whatever.

The problem with the statutory scheme under Sec. 1304, as amended, is that over-the-air casino gambling advertising is either injurious to the public or it is not. It cannot be both injurious and not injurious at the same time. If a broadcaster is permitted to carry a commercial announcement saying "Play our slot machines" over the air on behalf of an Indian casino, it is presumably because that announcement is not injurious to the public. If that is the case, however, how can the same broadcaster's carriage of the same announcement, "Play our slot machines", on behalf of a state licensed casino ten minutes later be injurious to the public? The answer, we submit, is that it cannot be. The statutory scheme of Sec. 1304, as amended, in which broadcasters are both permitted to and barred from carrying the same commercial announcement, is irrational. Whatever governmental purpose there may be behind this restriction cannot save it, because the selective nature of the restriction is self defeating.

This Court has recognized that it is not only the rights of the speaker, in this case the broadcaster or the state licensed casino operator, that are at issue in commercial speech situations, but also the rights of the audience. What is the effect on the audience of this governmental restriction on speech? Plainly, by permitting the audience to receive broadcast announcements about Indian, not-for-profit, governmental and occasional and ancillary commercial casino gambling, but not permitting the audience to receive broadcast announcements about state licensed casino gambling, the Government is depriving consumers of information concerning casino gambling choices lawfully available to them in the marketplace.

As was shown in the first part of this brief, the statutory scheme here is irrational from the point of view of the governmental purposes allegedly being served by it. Regardless of what the Governmental purpose may be, however, the effect of the scheme is clear: it provides

consumers with information about casino gambling conducted by parties who are favored by the Government and deprives them of information about casino gambling conducted by parties who are disfavored by the Government. The Government here is manipulating the casino gambling marketplace indirectly by depriving the consumer of information about choices lawfully available in the market.[9]

In *Virginia Pharmacy Bd. v. VA. Consumer Council*, 425 U.S. 748, 756 (1976), which involved a ban on price advertising of prescription drugs by pharmacists, this Court said:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. * * * If there is a right to advertise, there is a reciprocal right to receive the advertising (footnote and citations omitted.)

The Court went on to state:

> Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. * * * As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. * * * Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial", may be of general public interest, * * * Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what

[9] Under the First Amendment could the Congress permit broadcasters to carry ads for General Motors and Ford cars, for example, and forbid them to carry ads for Toyota, Volkswagen and other foreign based auto manufacturers?



> product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. (Footnotes and citations omitted, 425 U.S. at 762-765).

The Court in *Virginia Pharmacy Board* then responded to the State's arguments that consumers would make irresponsible choices if they were able to choose between higher priced but higher quality pharmaceuticals with high quality prescription monitoring services on the one hand, and cheaper but lower quality pharmaceuticals without such services on the other:

> [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
>
> * * *
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is, to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. * * * It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways (Citation omitted). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. (425 U.S. at 769-770).

While the Court has split on several aspects of commercial speech law in the years since *Virginia Pharmacy Bd*, these notions have remained at the heart of the Court's First Amendment jurisprudence in this area. Illustrative of this is the fact that in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996), in their opinions both Justice Stevens (116 S. Ct. at 1505) and Justice Thomas (116 S. Ct. at 1516) quoted extensively from *Virginia Pharmacy Bd.* As Justice Thomas said in his concurring opinion (116 S. Ct. at 1517):

> In case after case following *Virginia Pharmacy Bd.*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; * * * [10] and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly. fn. 2.

Footnote 2 cites to the Court's decisions in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1997); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364-365, 368-369, 374-375, 376-377 (1997); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1979), *Central Hudson*, 447 U.S. at 561-562; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985), *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-422, n.17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767, 770 (1993); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084, 2088-2089 (19994); *Rubin*, 514 U.S. at 481 (1995); and numerous concurring and dissenting opinions in these and other cases.

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[10] The omitted clause is "the near impossibility of severing 'commercial' speech from speech necessary to democratic decision-making", a question not at issue here.



With regard to discrimination, the Court in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) struck down a regulation which discriminated between newsracks distributing commercial handbills and those which distributed newspapers, and stated: "[J]ust last term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas,'" citing *Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The discrimination at issue in this case, between lawful commercial speakers of the same message solely on the basis of the identity of the speaker, is also suspect under the First Amendment and should also be struck down by the Court.

In its first decision below the Fifth Circuit stated, in defense of its ruling on the third part of the Central Hudson test, "Additionally, Congress is permitted more intrusive regulation of the broadcast media than other forms of media," citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 2456 (1994), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-9 (1969) (GNOBA I, 69 F.3d at 1302, fn. 7). The scarcity rationale of *Red Lion*, however, has no bearing on the commercial free speech question at issue in this case, and does not in any way justify the discrimination among speakers of the same mesage which is imposed on broadcasters here. The Court in *Turner* stated:

> [T]he inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. *Red Lion*, 395 U.S., at 390. As we said in *Red Lion*: "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridge-

> able First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, 395 U.S. at 388. (512 U.S. at 638)

Whatever the viability of the scarcity rationale may be today,[11] it has no bearing on the issues in this case. Among the "limited content restraints" placed on broadcasters has always been 18 U.S.C. 1304, which forbade the broadcast of all lottery advertising, as discussed above. For over 50 years, from 1934 until 1988, although newspaper advertising of casino gambling was common in jurisdictions where such gambling was legal, no broadcaster ever challenged the ban on broadcast advertising of casino gambling on the basis of "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." It was not until Sec. 1307(a)(2) and Sec. 2720 of the Indian Gaming Regulatory Act, which discriminated among lawful advertisers who wished to speak the same message, became the law that these amendments were challenged. In this regard it should be noted that in *Turner* the Court also stated:

> [T]he argument exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute from engaging in "censorship" or from promulgating any regulation "which shall interfere with the [broadcasters'] right of free speech." 47 U.S.C. § 326. 512 U.S. at 650.

What we contend here is that the Government's requirement that broadcasters discriminate between lawful advertisers seeking to air the same message solely on the basis of the identity of the advertisers constitutes censorship and interference with the broadcasters' right of free speech under the First Amendment.

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[11] The Court in Turner noted that "courts and commentators have criticized the scarcity rationale since its inception". 512 U.S. at 638.



As indicated at the start of this discussion, Amici submit that the discriminatory nature of the statutory scheme at issue here violates the First Amendment on its face. This may raise a question as to how our view of this case comports with the Central Hudson test. It is not our purpose to argue, on the basis of this one case, that the Central Hudson test is flawed, although we recognize that some members of the Court believe it is, or that strict scrutiny should necessarily apply to all commercial speech cases, although we recognize that that view is also held on the Court, and that other amici in this case so contend. In our view this case turns on the particular statutory scheme employed and on the type of restriction on commercial speech which results, matters presently not specifically addressed in the Central Hudson test.

The First Amendment analysis must start, we agree, with the first part of the Central Hudson test, an inquiry into the type of speech involved, that is, whether the activity is lawful and the speech not misleading. Once that is determined, however, we suggest that before turning to the governmental purpose behind the restriction on speech, the Court might examine, perhaps in a part 1B, the restriction on speech itself, to determine whether it is a type of restriction which is or is not acceptable under the First Amendment. Is it, for example, a time, place or manner restriction which is content neutral, or is it such a restriction which is not content neutral, and thus presumably contrary to the First Amendment, regardless of the governmental interest being served. Or it is, as in this case, a restriction on commercial speech which discriminates solely on the basis of the identity of the speaker, which we submit is also contrary to the First Amendment, without regard to whatever governmental interest there may be behind the restriction. Or is it a restriction which protects consumers from misleading, deceptive or aggressive sales practices, or conversely, one which is unrelated to the preservation of a fair bargaining process? Should there be, as Justice Stevens proposed in *44 Liquormart* (116 S. Ct. at 1507) a different degree of scrutiny de-

pending upon which of these types of restriction is involved? Although the commercial speech cases which have come before the Court tend to group themselves by the type of restriction on speech which is involved, the *Central Hudson* test does not take cognizance of that factor in measuring them under the First Amendment. Instead of looking for a single talisman for all commercial speech cases, the Court might consider merely adding a part 1B to the *Central Hudson* test, so as to focus more on the type of governmental restriction on commercial speech which is involved in each case, and less on the governmental purpose behind the restriction.

## CONCLUSION

Because of the overall irrationality of 18 U.S.C. 1304, as amended, the statutory scheme at issue here, it cannot directly and materially advance the Government's interests in reducing public participation in commercial lotteries and assisting states which do not permit casino gambling. That being the case, the Government's restriction on the commercial speech of broadcasters fails the third part of the *Central Hudson* test and, accordingly, violates the First Amendment. It is not necessary for the Court to reach part three of *Central Hudson,* however, because the statutory scheme of discrimination based solely on the identity of the speaker of an otherwise acceptable commercial announcement, or the identity of the party on whose behalf the announcement is broadcast, on its face violates the First Amendment. In either event, the statutory scheme at issue in this case violates the First Amendment rights of broadcasters.

Respectfully submitted,

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